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REPORTS

OF

CASES

ARGUED AND DETERMINED

THE SUPREME COURT

OF

LOUISIANA.

By MERRITT M. ROBINSON.

VOLUME I.

From October, 1841, to March, 1842.

NEW ORLEANS.
PUBLISHED BY E. JOHNS & CO.

1842.

PREFACE.

In conformity with the interpretation generally placed upon the acts regulating the manner of reporting the decisions of the Supreme Court, in force prior to the last session of the General Assembly, my predecessors considered themselves bound to publish a report of every case determined by the court. Under a system of jurisprudence which allows an appeal to the Supreme Court, in every civil case in which the amount in dispute exceeds a small sum, at the discretion of the party, and on questions of fact as well as of law, the publication of every decision necessarily led to the rapid and expensive accumulation of volume upon volume, increasing in a ratio proportioned to the augmentation of the population and business of the country, and to the consequent multiplication of its laws. The continuance of this practice is to be deprecated, not only as entailing a heavy annual expense upon the state and the profession, but, in as much as a large proportion of every volume must unavoidably consist of matter of little or no value, as calculated to diminish the usefulness of the reports of the really important cases, by burying them in a mass of unprofitable matter, rendering them at once more expensive to be purchased, and more inconvenient for use when obtained.

The publication of the five last volumes of the Louisiana Reports within the short space of fourteen months,* drew the attention of the Legislature to this subject, and probably led to the insertion of a clause in an act passed at its last session, investing the judges of that court with the power of omitting certain classes of cases of no value to the profession or to the public. The third section of that act (of the 26th March, 1842,) provides, "that it shall be the duty of the judges of the Supreme Court, whenever they pronounce an opinion in any case, to determine at the same time whether the same shall be reported; *provided*, that every case in which an opinion is pronounced shall be ordered to be reported,

* The 15th volume was published, in January, 1841; the 19th, in March, 1842.

except cases in which damages shall be awarded for frivolous appeals, or cases turning exclusively upon questions of fact." This section also makes it the duty of the judge who delivers the opinion of the court, whenever a case is ordered to be reported, "to endorse such order thereupon; and whenever the judges decide that a case shall not be reported, to endorse thereon the reason of such determination, as that the case was a frivolous appeal, or turned exclusively upon questions of fact." A further proviso, declares, "that whenever a decree is rendered, either party shall always have the right to require that the case be reported, if he deem proper."

This provision, though restricting the discretion of the court more than was compatible with a thorough reformation of the evils of the old plan of reporting, empowered it to discard two classes of cases manifestly of no value; and on assuming the duties of my appointment, I transmitted a copy of the act to the judges of the Supreme Court, with a request that they would instruct me what course I should pursue, in regard to the publication of the cases in which opinions had already been delivered, but which had not been embraced in the last volume of the Reports, including more than seventy decided at Alexandria, in October, 1841, and all of those determined in New Orleans, from the meeting of the court in November, to the last of March, when the 19th volume of the Louisiana Reports was issued from the press, and inviting their attention to the provision making it the duty of the judge in delivering the opinion of the court in any case, to endorse thereon whether it should be reported or not. To this communication, I received the following reply:

SUPREME COURT ROOM,
New Orleans, April 19th, 1842.

SIR,

We have the honor to acknowledge the receipt of your note, inclosing a copy of the act of the Legislature, lately promulgated, relative to the publication of the decisions of the Supreme Court, and calling our attention to the section which relates to the determination of what cases shall or shall not be reported.

The third section of the act declares, that "when a decree is rendered, either party shall always have a right to require that the case be reported, if he deem proper." It is true that other parts of the act

require the judges to designate what cases may be omitted from the Reports; but if such directions may be disregarded, at the will of either party, it is clear that the duty thus imposed on us, is not a judicial one, for if it were, our determination would, necessarily, be final.

Our wish is that publicity should be given, as soon as possible, to all the decisions rendered by us; and if any are to be omitted in the Reports, we cannot consent to their being suppressed by any order of ours. The omission must depend upon the consent of parties.

We have the honor to be,

Very respectfully,

Your ob't servt's,

F. X. MARTIN,
H. A. BULLARD,
A. MORPHY,
R. GARLAND.

M. M. ROBINSON, Esq.
Reporter.

Without presuming to pronounce any opinion as to the correctness of the reasoning, by which the court were influenced in determining not to carry into effect this provision of the law, I cannot but express my regret that any circumstance should have led to the defeat of so useful an enactment. In the conclusion of their letter, the judges of the Supreme Court say, that 'the omission of any cases must depend upon the consent of the parties.' The law gives to either party the right to require that a case shall be reported, on the ground of their supposed interest in having the decision made public; but it gives them no power whatever to authorize any case to be omitted, nor is any such power conferred on the Reporter; the court alone have the right to exercise it. Under these circumstances, I have not felt myself authorized to assume a power not intended to be entrusted to me; and I have, consequently, published a report of every decision rendered by the court within the period embraced by the present volume, with the exception of the few cases in which damages have been awarded for frivolous appeals,—a class clearly marked, and plainly intended to be omitted.

As the interest of the Reporter, so far as mere pecuniary profit

is to be derived from his labors, would incline him to desire the publication of as many volumes as possible in every year, I hope that I shall be pardoned for expressing an earnest wish, that the next Legislature may invest the court with the powers granted to the supreme tribunal, or to the Reporter, in almost every other state of the Union, in none of which it is so much needed as in this, of excluding from the Reports cases of no value to the bar or to the public. A repeal of the entirely useless provision, investing the parties to the suit with the power of determining, in opposition to the decision of the Supreme Court itself, whether a particular case shall form a part of a publication designed for the advancement of the science of jurisprudence; and an extension of the discretionary power now conferred on the court, so as to embrace among the cases it shall be authorized to omit, such as are mere repetitions of well settled principles of law, established by previous and repeated decisions, would do much to correct the evil so generally complained of. By these means, the number of cases required to be reported annually, would be greatly diminished; the expense to the profession, and to the state, reduced in an equal degree; and the reputation of the Reports themselves elevated, and their circulation and usefulness increased, both at home and abroad.

Some unwillingness appears to have been felt to confer upon the Court the power of determining what portion of its decisions shall form a part of the Reports, from an apprehension that it might be abused for the purpose of screening itself from the censure that might otherwise attach to an obnoxious decision. The experience of other states, proves the groundlessness of this apprehension; and when it is recollected, that here every decision is required to be pronounced in open court, that a copy must be transmitted to the court from which the case was brought up, that the records of the Supreme Court are always open to the public, that official copies of every judgment can be obtained by any one who chooses to apply for them, and that the parties and their counsel, animated by personal interest, or professional pride, will be ever ready to expose any abuse calculated to injure them, it can hardly be supposed that an attempt will ever be made by the court to evade its responsibility to public opinion, by excluding any judgment from the volume of published reports, the more particularly, as such an attempt would be the surest means of drawing public attention to the case, and the strongest evidence of there being something wrong

in the decision. Composed as the Supreme Court of this state is likely always to be, it is more probable that the judges will be desirous of satisfying the public of the severity of their labors, by the frequent publication of volumes of reports, than that they will ever attempt to shield themselves from public animadversion for the assumption or abuse of power, by withholding their opinions from the Reporter.

Regarding the publication of the decisions of the Supreme Court as designed rather for the dissemination and preservation of a knowledge of the jurisprudence of the state, than as a mere register of the litigation of individuals, I have prepared the reports of the cases in this volume, with the sole view to its value to the profession. By omitting what was useless, and condensing wherever it appeared to be judicious, I have been enabled to include in the present volume nearly as many cases as were contained in the two last of the Louisiana Reports. * Much pains has been taken in the preparation of the notes prefixed to each case of the points determined, or principles of law asserted, or expounded in the opinion of the court.

The minute and accurate statements of the facts of each case, made by the court, have, in most instances, left nothing to be added by the Reporter; but wherever, after a careful examination of the record, I have detected any accidental error in the recital of facts in the opinions of the court, or have had reason to believe that a further statement was required to place the reader in possession of every thing necessary to comprehend the full extent of the decision, I have either corrected such errors or omissions, or made a statement of my own. The few instances in which either has been done, proves the great accuracy and labor with which this portion of the duties of the court has been discharged.

The laws heretofore in force contemplated the publication of the points filed by the counsel, as a means of presenting a synopsis of the argument made before the court; but the little attention which has generally been given by counsel, and particularly by those in the largest practice, to the preparation of the points required to be filed, renders them, in a large majority of cases, almost useless in the hands of the Reporter. In many instances, it is evident from the

* This volume contains 242 cases. The 18th and 19th of the Louisiana Reports, together, 243.

opinion of the court, that the argument has turned on grounds entirely different from those stated in the points; in others, in consequence of frequent references to the record, they would be entirely unintelligible without the latter. In all these cases, and in others in which the court have themselves recapitulated the points made in argument, or filed in the record, I have not attempted to report what would be necessarily imperfect, or of no value to the profession. The notes of counsel have been published only where they have appeared of value, either as illustrating the decision, or for future consultation. Wherever the court have confirmed the positions of counsel, it has been deemed unnecessary to repeat in the form of arguments from the bar, what has, by adoption into the opinion of the court, become a part of the law as announced in the decision.

In the designation of the cases by the names of the parties, I have occasionally found it necessary, in order to preserve any system, to alter partly the title under which they were known in the lower court. In suits growing out of the administration of successions, the name of the deceased has been used, instead of classing as plaintiff and defendant parties who really bear no such relation to each other.

By the omission of the useless and inconvenient marginal repetition of the notes printed at the head of each case, the page itself thas been rendered considerably larger than that of former volumes, without any loss to the reader. The copious and accurate digest of the whole contents of the volume, in the form of an index, it is hoped will be found of practical and permanent value.

In conclusion, I trust that the care which has been bestowed on the preparation of this volume will be taken as an earnest of my desire to discharge the duties of my appointment faithfully, and to the satisfaction of the profession; from whom I shall be always gratified to receive any suggestions for the improvement of future volumes.

M. M. ROBINSON.

45 Camp street, New Orleans,
September, 1842.

TABLE

OF THE CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

WESTERN DISTRICT, AT ALEXANDRIA,
OCTOBER, 1841.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. RICE GARLAND.

JOHN TAYLOR'S Adm'rs & OSGOOD WHITTIER'S Curator *v.* RICHARD S. JEFFRIES' Adm'rs. 1r 1 107 562 | 1r 1 117 791 |

Clerks of courts cannot certify any thing done in the prosecution of a suit, otherwise than by a copy of the minutes or records, unless specially authorized by law.

An endorsement by the clerk of the court of probates on the petition of an administrator for the homologation of a tableau of distribution, that it was advertised on a certain day, is not sufficient proof of the publication of the advertisements required by law.

APPEAL from the Court of Probates for the parish of Rapides, *Johnston*, J.

Brewer and *Dunbar*, for the appellants.

The opinion of the court was delivered by

MARTIN, J. This case was remanded at the October term, 1836, with directions to the judge of probates of the parish of Rapides to

enquire into the right of the appellants (Taylor & Whittier) to appeal.

The court of probates has certified to us that the appellants are creditors of the estate of R. S. Jeffries, deceased.

The appellants now show that there is no other evidence of the publication of the advertisement required by law giving notice of the filing of the tableau of distribution ten days before its homologation, than the mere endorsement of the clerk of probates on the back of the administrator's petition, that it was "*advertised the first of February*, 1834."

This proof of advertising and notice is evidently insufficient. Clerks of courts cannot certify any thing that was done in the prosecution of a suit, otherwise than by a copy of the minutes or records of the court, except in cases in which they are specially authorized, as in certificates to the record on appeal, and that the record has not been brought up on the appeal in time, and the like cases. Code of Pr., arts. 586, 589.

The court of probates in our opinion erred in homologating the tableau without proof of the publication and advertisements required by law.

It is therefore ordered that the judgment of the court of probates be reversed, and that this case be remanded for further proceedings according to law. The costs of the appeal to be paid by the estate.

JAMES PINNELL, Tutor, and another, *v.* BENNA SCRIBER, Adm'r.

The provision of the Code of Practice requiring the testimony of witnesses before the courts of probate to be taken in writing, does not give such testimony a higher character than other parol evidence reduced to writing in the form of a deposition; and can never be used when the attendance of the witnesses can be procured.

APPEAL from the Court of Probates for the parish of Ouachita, *Lamy*, J.

Garrett, for the plaintiffs and appellants.

McGuire, for the appellee.

BULLARD, J. This case was before us on a former occasion,

and was then remanded for a new trial, this court having decided upon a question of commissions only. See 12 La. 608.

The heir at law has again appealed from a judgment allowing a balance due to the late administrator, whose account had been opposed on several grounds. Her counsel has called our attention to a bill of exceptions in the record upon which he relies, and from which it appears, that upon the new trial the judge permitted the testimony taken on the former trial to be read, although opposed on the ground that the witnesses were still living in the parish, and ought to be re-examined, and that the trial being *de novo* all testimony must be introduced anew; but the court was of opinion that it might be used as recorded edivence regularly taken, stating at the same time that the parties were at liberty to introduce the same witnesses and go over the same ground again if they thought proper. We are of opinion that the court erred; no good reason suggests itself to our minds why this should form an exception to the general rule. It is true the Code requires that the evidence shall be taken in writing in the court of probates, but we think it does not thereby acquire a higher character as evidence than other parol evidence reduced to writing in the form of depositions, which clearly cannot be used when the attendance of the witness can be procured. 6 Martin N. S. 353; 5 La. 356.

But we do not regard the error thus committed by the court so important in this case as to make it necessary to remand the cause. The written evidence in the record together with the testimony adduced on the last trial, are sufficient upon the only points in controversy, independantly of the parol evidence taken on the former trial, to enable us to render a final judgment.

Three items only were contested. 1st. Two hundred and twenty-eight dollars for bagging and rope used by the administrator, for which it is contended he is bound to account. 2d. A sum of one thousand dollars which it is argued was improperly allowed as per receipt of the deceased: and 3d. The fee of counsel for attending to the settlement of the accounts.

I. The evidence appears to us to authorize the charge of two hundred and twenty-eight dollars for bagging and rope, &c., used by the administrator and belonging to the estate. This charge is

supported by the written acknowledgment of the defendant in the record.

II. The sum of one thousand dollars was, in our opinion, properly allowed the administrator as a credit. Admitting that the parol evidence to explain the receipt given by J. L. Scriber was incorrectly received, whether that sum was taken from the crop on their father's estate, or from that of the accountant, appears to us quite immaterial. If the crop spoken of be taken to be that of Abraham Scriber, the father, of whose estate the defendant was administrator, we are to suppose that he had accounted to the heirs for that part of the crop, and consequently the heir who received it is accountable to him; *à fortiori*, if it was taken from his own crop.

III. We are of opinion also, that two hundred and fifty dollars was properly allowed for the services of counsel.

The judgment must be reformed so far as it relates to the two hundred and twenty-eight dollars.

The judgment of the court of probates is therefore reversed, and proceeding to render such judgment as in our opinion should have been given in the court below; it is further adjudged and decreed that the account rendered by the administrator as herein amended, be confirmed and homologated, and that he recover of the appellant the balance of his account, to wit: the sum of seven hundred and forty-four dollars and thirty-seven cents, with costs in the court below, and that those of the appeal be paid by the appellee.

BENJAMIN GRUBB and others, Heirs, &c. *v.* FRANCIS HENDERSON.

Where the will does not give the seizin of the property to the executor, and he is not shown to have had possession of that which is sued for, he will not be responsible, unless he has neglected to take possession of the estate when entitled to do so; and in the last case, the heirs have only the right of demanding an account of his executorship, and the delivery of any property in his possession, or any balance due; and this account can only be demanded in the court of probates.

APPEAL from the District Court for the parish of Rapides, *Wilson*, J.

This action was commenced in 1834. The plaintiffs allege in their petition that they were decreed by the court of probates for the parish of Rapides to be the legal heirs of Benjamin Grubb, who died possessed of real and personal property, of which a list was annexed; that by a decree of the said court, subsequently confirmed by the supreme court, the defendant was ordered to deliver to them certain notes given by him for the purchase of a tract of land from their ancestor; and that as his heirs they are the owners of said notes. They further allege, that by the said decree the defendant had been ordered to deliver to them all the property of such ancestor, but that he still refused so to do; that George Gordon Grubb and Manuel Gordon Grubb, in whose favor the notes were executed, had given no consideration for them, and that they were drawn in their favor for the purpose of effecting, illegally, a donation *inter vivos* to the said George and Manuel, who were the illegitimate children of the deceased. The petition concludes with a prayer that the defendant may be ordered to deliver to them the property of their ancestor, and to pay them the amount of the said notes, with damages and costs.

The defendant denied generally the allegations of the petition, and specially that he had any property belonging to the ancestor of the plaintiffs; he claimed a credit on the notes, and a deduction on account of deficiency in the land for the purchase of which they were given.

A curator *ad hoc* was appointed to represent George Gordon Grubb and Manuel Gordon Grubb.

The case came on for trial at the November term, 1836, *Boyce*, J., presiding. The plaintiffs offered in evidence certified copies of the inventory of the estate of Benjamin Grubb; the record of the suit of *Grubb's Heirs* v. *Francis Henderson*, before the probate court of the parish of Rapides, admitting them as heirs of Benjamin Grubb; the record of the suit of *Grubb's Heirs* v. *Jane Gordon and others*, before the same court, rescinding the order for the execution of Grubb's will, and declaring the same null and void; and the dedositions of Maraday Neal and William Dark. The testimony of Neal established the facts, that Jane Gordon, otherwise called Jenny Grubb, lived with the testator at the time of his death and for many years before, as his concubine; that she was

never considered his wife; that Manuel Gordon Grubb and George Gordon Grubb were universally regarded as her children, the former by Benjamin Grubb, and the latter by a mulatto slave of said Grubb named Chance. The evidence of Dark proved that he had been sent for by the testator who delivered to him the notes sued for, which had been given by the defendant for the land purchased of testator, stating that he wished one of them to be applied to the payment of his debts, and the others to be given to the two children to whom they were made payable; that he stated that the notes were drawn in that way that the children might get the money. Dark further testified that the mother of these children was not the wife of Grubb, but lived with him as his concubine; and that *both* the children were raised by him and claimed as his own.

There was judgment in favor of the plaintiffs for six thousand seven hundred and twenty dollars, with interest, 'without prejudice to the claims set up by the plaintiffs for other amounts besides that of the notes sued on'; and the case was continued, by consent, as to the other demands in the petition. At the November term, 1837, before *Wilson*, J., the counsel of the defendant offered the depositions of Thomas Neal and William Dark to prove that the defendant had never had possession, as executor, of any of the property mentioned in the inventory of Grubb's estate.

This evidence was objected to on the grounds: 1. That the defendant had, in a suit between the present parties, admitted that he was in possession as executor, and that he could not be permitted to offer parol evidence to contradict his judicial admission. 2. That the admission of such evidence would have the effect of permitting the defendant to take advantage of his own wrong. 3. That by law it was the duty of the executor to take charge of all the property of the succession, and not to pay any legacies, though legally made, until all the debts were first paid out of the proceeds of the sale of the movable property. 4. That the inventory having been made at the request of the executor, and in his presence, the law implied possession, and that the executor cannot be permitted to controvert this unless dispossessed by some *vis major*, and without any fault on his part. These objections were overruled, the depositions admitted, and the plaintiffs excepted.

A copy of the will of Benjamin Grubb, with the order of the

court of probates of the parish of Rapides, admitting the same to record, was offered in evidence by the defendant; and excepted to by the plaintiffs.

The evidence clearly established that the defendant had never had possession, as executor, of the property mentioned in the inventory: and judgment was rendered that the plaintiff should take nothing further by his suit than had been allowed by the judgment at the November term, 1836, and that the plaintiffs should pay the costs since that judgment, and the defendant those which had previously accrued, or which might grow out of any further proceeding on the first judgment. A motion by the plaintiffs for a new trial was overruled. The plaintiffs appealed.

O. N. Ogden, for the plaintiffs.

Thomas, for the defendant.

MARTIN, J. The plaintiffs' ancestor being desirous to provide for his natural children and their mother, made a will in their favor, and afterwards being apprehensive that the will might not be carried into effect, sold a tract of land to the defendant, whom he had named as one of his executors, on a credit, and took his notes for the price, in the names of and payable to his natural children. The plaintiffs being dissatisfied with the will, instituted a suit in the court of probates, in which the donation to the natural children was revoked, and they accordingly obtained possession of the notes which the defendant had given to their ancestor for the land, and which had remained in possession of the latter until his death. The object of the present suit is the recovery of the amount of the notes, and the restoration of the personal property of the deceased which still remained in possession of the defendant. In November, 1836, the case was acted upon as far as it related to the notes, and by consent the trial as far as it related to the other claim of the plaintiff was postponed until the following term, when there was a judgment of nonsuit in regard to the latter part of the plaintiffs' claim. In the will the personal property of the plaintiffs' ancestor was given to the mother of his natural children; it consisted of household furniture, stock, etc. At his death she was permitted by the defendant to retain what was thus left to her, and the defendant never interfered therewith; the plaintiffs for nearly twelve years made no claim. It does not appear to us that the court erred. The

defendant is not shown to have ever had any part of the property in his possession, he therefore cannot be liable otherwise than if, as executor, he neglected to take possession of the estate, having a right so to do; and on this hypothesis the heirs have only the right to demand an account of his administration as executor, and the delivery of any property of the estate in his possession, or any balance which may appear due from him; this account can only be demanded in the court of probates. The will does not give the seizin of the property to the executor.

Judgment affirmed.

JOHN T. FAULK *v.* THOMAS T. CLACK.

Failure of consideration, will be no defence by the maker, to an action by the purchaser of a note sold at a sheriff's sale, unless it be proved that the purchase was made with knowledge of such defence.

APPEAL from the District Court of Ouachita, *Wilson*, J.

McGuire, for plaintiff and appellant.

Garrett, for appellee.

MORPHY, J. A tract of land purchased of the estate of the late Gabriel J. Griffing, by one P. Averett, for five hundred and sixteen dollars, was afterwards sold by the latter to the defendant for one thousand five hundred dollars, payable in three notes of five hundred dollars each, drawn to the order of the seller, and maturing on the 1st of March of the years 1837, 1838 and 1839. In this sale it is mentioned that the property is subject to a mortgage in favor of Griffin's estate for the five hundred and sixteen dollars. The plaintiff, a judgment creditor of Averett, caused the second and third of these notes to be seized and sold under an execution against his said debtor, and bought them himself for the sum of two hundred dollars. The present suit is brought on the first of these two notes which became due on the first of March, 1838. The answer admits the execution of the note sued on, but avers that plaintiff ought not to have or maintain this action, because the consideration for which defendant's note was given has entirely

failed, and had failed before it came into the plaintiff's possession, of which fact he had full notice at the time of the sale of said note, and because defendant has been actually deprived of his possession of the property for which this note was given in part payment, by a decree in favor of Griffing's estate. The inferior court rendered a judgment in favor of defendant, from which plaintiff has appealed.

The record shows that in an hypothecary action instituted against defendant by Hempken, as administrator of Griffing's estate, a judgment was rendered decreeing him to pay the price yet due on the property by Averett, or to abandon it. The defendant thereupon made a relinquishment of the mortgaged premises, which were sold to satisfy this demand.

It is clear that the defendant having been thus evicted by reason of an incumbrance against which his vendor was bound by law to guarantee him, he would have been justified in refusing to pay the notes by him given for the purchase of the property, had they been sued on by said vendor; but this defence cannot be opposed to the plaintiff, who has become the purchaser of this note at the public sale made by the sheriff, unless it be proved that he purchased it with a knowledge of such defence. It appears on this head, that on the day that the sale of these notes took place, a public proclamation was made at the instance of defendant that the notes would not be paid, as he had a good defence to make against them, and that written notices to the same effect were posted up at the court house door and at a public tavern in Monroe. It appears moreover that plaintiff's agent purchased these notes after having seen these notices, and after having been fully warned by defendant that he would resist the payment of these notes, and had a good defence against them. Although the nature and merits of this defence were not disclosed (at least the evidence does not inform us that they were), we incline to believe that the warning given was sufficient to put a prudent person on his guard. The plaintiff cannot now complain, if defendant sets up against him the failure of the consideration for which he gave this note. He took the risk of the defence which might be made, and obtained these notes for a trifling amount, which he did not even disburse, as it was credited on the execution he had taken against Averett, under

a judgment which had been assigned to him. It turns out to be an unsuccessful speculation, in which he loses however only the chance of being paid a bad debt. Our attention has been called to the testimony of the attorney of Hempken, the administrator of Griffing's estate. He testifies that he proposed to defendant to dismiss the hypothecary action brought against him if he would pay the first note of five hundred dollars due Averett, in March, 1837, but that the defendant answered that he would not do so, as he could, if the property were sold under the mortgage, get clear of his three notes to Averett of five hundred dollars each. It does not appear whether Hempken's attorney had then in hand the note proposed to be paid, and was ready to deliver it to defendant, and at the same time cancel the mortgage in favor of Griffing's estate. But even if such had been the proposition, however apparently favorable, defendant was under no obligation to accept it. His answer shows a readiness or determination, perhaps not very commendable, to free himself from the obligations of his contract with Averett, which he no doubt considered as an onerous one; but whatever were his motives for refusing the offer, they cannot vary the legal rights which he derives from the failure of his vendor to comply with his obligations towards him.

Judgment affirmed.

ALBERT NANTZ *v.* ELIZABETH WYATT, widow, and others heirs of Jesse Wyatt—FREDERICK LOWE, warrantor.

A compromise by a tutrix will not be binding on the minor, unless subsequently ratified by the latter.

APPEAL from the District Court for Ouachita, *Boyce*, J.

Garrett and *Downs*, for the plaintiff.

McGuire, for the defendants and warrantor, appellants.

MARTIN, J. The plaintiff claims a slave named David as his property, which is in the possession of the defendants. The latter deny the right of the plaintiff to said slave, and set up title to him under Jesse Wyatt, deceased, the late husband of the widow Wyatt, and father of her children and heirs, who purchased this slave for a

valuable consideration from Frederick Lowe, who is cited in warranty.

Lowe pleaded the general issue, and averred that he married the plaintiff's mother, Elizabeth Nantz, who was then in possession as the owner of the slave in contest; that she was much in debt, and that the slave was sold to relieve her, the sale being effected by him, and the money arising therefrom appropriated to the payment of her debts. The defendants and warrantor have appealed from a judgment decreeing the restoration of the slave, and against the latter in warranty.

The record shows, that the slave was transferred to the plaintiff when a minor, by one John Steen, in consequence of a compromise between his mother and tutrix and the said Steen, by which she transferred to the latter all the right of the plaintiff, her son, in the estate of his grandmother. That afterwards Frederick Lowe having married the plaintiff's mother and tutrix, sold the slave to Jesse Wyatt, the late husband and father of the defendants. It is clear that the plaintiff was not bound by the compromise made by his mother, on his behalf, with Steen; but it is equally clear, that he had the right of ratifying this compromise and claiming the slave as his property. The institution of this suit is evidence of the ratification. Lowe, the husband of plaintiff's mother, had no right to sell the slave so as to effect the plaintiff's title, or transfer that of his wife, even *if she* had any. Wyatt, therefore, acquired nothing by his purchase from Lowe. His widow and children are consequently without a shadow of title to the slave in contest. Lowe, having sold a slave, which did not belong to him, judgment was properly given against him as warrantor.

Judgment affirmed.

Caleb R. Parker v. John H. Hewitt.

Interrogatories by defendant to the plaintiff, though sworn to be material to the defence, will be struck out, when evidently propounded only for delay.

Appeal from the District Court for Ouachita, *Wilson*, J.

Garrett, for the plaintiff.

Copley, for the defendant and appellant.

MARTIN, J. This is an action against the maker of a promissory note, which expresses on its face, that it is for 'money which the plaintiff advanced to the defendant to *enter land* and which he *appropriated to his own use.*' The note is made payable to the plaintiff's order with ten per cent interest from the date.

The defendant pleaded as an exception that the note was not given as a negotiable instrument, but merely as an acknowledgment of a sum of money in deposit in the hands of the defendant, subject to future arrangement.

On the merits he averred that he owed nothing, and that the money was advanced for the purpose of locating two floats, the plaintiff agreeing to furnish the numbers of the land to be floated on, and to pay him the further sum of $520, which he has failed and refused to do, although the defendant avers he was ready to comply on his part. He then pleads the sum of $520 in reconvention. There was judgment for the plaintiff, and the defendant appealed.

An interrogatory was propounded by the plaintiff in his petition to the defendant touching the claim sued on, which was ordered to be answered on a particular day in open court, which the defendant did not answer. He propounded interrogatories in his answer in turn to the plaintiff, to which the counsel of the latter objected, and moved that they be stricken out, which motion and objections were sustained by the court, and the defendant's counsel took a bill of exceptions.

It does not appear that the court erred. The defendant acknowledged he had received the sum of money claimed, to be invested in lands for the plaintiff, but which he had applied to his own use.

The plaintiff resides in Georgia, and the district judge considered the interrogatories as a means of obtaining delay only. He had interrogated the plaintiff with a view of obtaining from him an acknowledgment that it was his fault that the money was not applied to his (the plaintiff's) object. Admitting this to be the case, the defendant was not relieved from the obligation of returning money which he acknowledged he had appropriated to his own use.

The execution of the note was admitted; and the defendant has failed to establish any of the matters set up in his defence.

Judgment affirmed.

DAVID STANBROUGH, Adm'r v. ISAIAH GARRETT, Adm'r.

A court of probate of another parish than that in which a succession is opened, cannot order the payment of a debt due by the succession, even when such debt is pleaded in reconvention to an action by the administrator. The court of probates of the parish in which it was opened, is alone competent to order the payment of the debts.

A letter of one of the parties cannot be used in evidence only to prove a particular fact, and the rest of its contents, though relating to the same subject, be excluded; the statements must be taken all together.

APPEAL from the Court of Probates for the parish of Ouachita, *Lamy*, J.

Downs and *Copley*, for the plaintiff and appellant.

Defendant, *in propria persona.*

BULLARD, J. This is an action brought by the administrator of the estate of Jesse Harper against the estate of the late J. M. Faulk, to recover the sum of five hundred dollars, alleged to have been placed in his hands by the plaintiff's intestate, and which he alleges was not employed according to his instructions.

The defendant pleads that Jesse Harper's estate is indebted to that of Faulk, administered by him, for monies advanced by him in the purchase of public lands, and for his services in purchasing and locating floats, in the sum of $550, which he pleads in compensation and reconvention, and he prays for judgment against the plaintiff in reconvention.

The defendant recovered the sum of fifty dollars on his reconventional demand, and the plaintiff appealed.

The judgment in this respect is clearly erroneous. The probate court of Ouachita is incompetent to order the payment of a debt due by the succession of Harper, which was opened in the parish of Madison. It is the court of probates for the latter parish, which alone is competent to order the debts due by the estate to be paid according to their rank.

Upon the merits, it appears from the correspondence between the two deceased persons and other evidence, that Harper placed in the hands of Faulk the sum of $500 for the purchase of floats. That he did purchase four at $125 each, and that the principal expressed himself satisfied with the acts of his agent. But in consequence of

the refusal of the late Register at Ouachita, to act for some time immediately preceding the 19th of June, 1836, when the pre-emption law of 1834 expired, the purchase of the public lands, to which the holders were entitled on paying the government price, could not be completed. Of this fact Harper was informed.

An attempt on the part of the plaintiff, to use in evidence a letter of Faulk, only to prove a particular fact admitted in the letter, and to exclude the balance, although the whole related to the same subject, was properly repelled by the court, who held that the statements must be taken all together and could not be divided.

It was obviously not the fault of Faulk, that the purchase was not completed. The funds in his hands appear to have been exhausted by the purchase of the pre-emptioners the right to enter the public lands as designated by Harper. Whether the same lots were afterwards sold by the officers of government or not, is not material in this case. Faulk is admitted to have died in April, 1837. His agency then ceased, and Harper survived until August, 1838. It was perhaps not too late at the death of Faulk to complete the purchase of the land, but there is no evidence to show, that the obstacles were removed at that time. We therefore forbear to express any opinion, whether the evidence offered to prove that the same lots were sold in 1838 to other persons, was legal and sufficient. Nothing which occurred after the death of Faulk, can change his liability.

The judgment of the probate court is therefore reversed; and proceeding to give such judgment as in our opinion should have been rendered below, it is further decreed, that there be final judgment for the defendant, and that the plaintiff pay the costs of both courts.

MARIA GRIFFING, Administratrix, v. GEORGE H. CALDWELL, JAMES H. BRIGHAM and SOLOMON W. DOWNS.

A judgment by default on a promissory note or other obligation alleged to have been signed by the defendant, cannot be made final without proof of the signature. Art. 324 of the Code of Practice does not dispense with this proof; the obligation of the defendant to confess or deny his signature does not arise until he answers.

Where there is no evidence that defendant had more than one domicil, it is unnecessary to state in the sheriff's return, that service of petition and citation was made at his *usual* domicil.

It is not necessary that it should appear from the sheriff's return, that the copies of petition and citation served on the defendant were sealed with the seal of the court, and certified by the clerk to be true copies.

A creditor has the right, but he is under no obligation to include the principal and surety in the same suit; and if he do, his right to judgment against the surety does not depend on his right to judgment against the principal.

A surety cannot require the creditor to sue the principal debtor before resorting to him for payment; his remedy is to pay the debt, and exercise the creditor's rights against the debtor to which he is subrogated, or to proceed under art. 3026 of the Civil Code.

APPEAL from the District Court for Ouachita, *Wilson*, J.

This was an action on a promissory note A judgment by default was confirmed against the defendant, Caldwell; the other defendants separated in their answers. Brigham answered that the plaintiff had not used due diligence in proceeding against the principal debtor, who had unincumbered property in the parish more than sufficient to satisfy the debt, and prayed that it might be discussed before proceeding against him. The answers of Downs contained the same allegations; and prayed for a discussion of the property of the principal debtor, and that any amount for which the securities might be liable should be divided between them.

The execution of the note was proved; and that the principal and each of the securities were possessed of sufficient property to satisfy the debt. Judgment was given against Brigham and Downs for the amount of the note to be equally divided between them, provided that the judgment should first be executed against the principal, Caldwell. A motion for a new trial being overruled, the defendants appealed.

McGuire, for the plaintiff.

Copley and *Downs*, for the defendants.

MARTIN, J. The defendants are appellants from a judgment against Caldwell and his co-defendants, Brigham and Downs, as his sureties on a promissory note.

The defendant, Caldwell, urges in this court, that there is no evidence of a legal service of petition and citation on him, the sheriff's return stating that copies were left at *his domicil*, instead of showing they were left at his *usual* domicil; and that it in no wise appears from the sheriff's return that the copy served on him was sealed and certified by the clerk to be a true copy of the one on which he makes his return, or that the original citation had the seal of the court; that as he was not duly cited, judgment by default was irregularly taken against him; and if it had been regularly taken it was illegally made final, as there was no proof of his signature.

It has been contended that there was no necessity of proving the defendant's signature because it was not specially denied. The Code of Practice, art. 324, provides that 'the defendant shall be bound *in his answer* to acknowledge expressly, or to *deny his signature*.' This obligation does not arise until the defendant answers. The court therefore, in our opinion, improperly permitted the judgment to be made final without proof of the defendant, Caldwell's, signature. The Code of Practice expressly provides that 'no definitive judgment shall be given until the plaintiff proves his demand. This proof is required in all cases;' art. 312. Judgment by default although improperly made final, was correctly taken, for the defendant had been properly cited. Nothing shows that he had more than one domicil. It was therefore unnecessary to state that service had been made at his *usual domicil*. In the case of *Bryan's Adm'r* v. *Sprewell*, 16 La. 313, we held, that 'although the seal of the court does not appear to the citation as it is copied into the record, *non constat* that it was not affixed to the original, and we are bound to presume that the clerk did his duty.' That case cannot be distinguished from the present one.

This case must therefore be remanded to afford the plaintiff the opportunity to make the necessary proof required to make the judgment final.

The counsel for the sureties contends that no judgment can be had against them, until one is rendered against the principal; for

they would in that case be deprived of the plea of discussion; and that it follows as a corollary that if judgment is reversed as to the principal, it must also be reversed as to the sureties.

The benefit of discussion must be demanded by the surety, who must point out the property to be discussed, and furnish a sufficient sum of money to carry it into effect. This has not been done in the present case. Civ. Code, arts. 3015, 3016.

No law requires a creditor to obtain judgment against the principal and sureties simultaneously; nor against the principal before he proceeds against the sureties. 'The surety cannot require the creditor to sue the principal debtor before resorting to him for payment. His remedy is to pay the debt and exercise his creditor's rights against the debtor, to which he is subrogated by the payment, or to proceed under article 3026 of the Civ. Code;' *Boutté, f. m. c., v. Martin et al.*, 16 La. 133.

The Civil Code also provides 'that the creditor *may* include in the same suit both the debtor and the surety. If he obtains judgment against both, the surety who is entitled to the benefit of discussion, *may* insist that the judgment shall be first executed against the principal debtor.' Idem, art. 3020.

The creditor has the faculty, but he is under no obligation, to include the principal and surety in the same suit. If he does, his right to judgment against the surety does not depend on his right to obtain judgment against the principal: for the Code says if he obtain judgment against both, which implies that he may have it against either, the surety may insist upon its being first executed against the principal debtor.

It is therefore ordered that the judgment of the district court so far as it relates to the defendants, Brigham and Downs, be affirmed with costs, except that part which directs execution to be first issued against the principal debtor, which part is hereby reversed. And that so far as it concerns the defendant, Caldwell, that it be reversed; and that the case be remanded for further proceedings on the judgment taken by default; and that the plaintiff and appellee pay the costs of the appeal.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Any objection to the amendment of a judgment, on the ground that the answer of appellee requesting it, was not filed three days before that fixed for the trial, as required by art. 890 of the Code of Practice, will be considered to have been waived, where the case was fixed by the appellant before the expiration of the three days allowed for filing the answer.

Downs and *Copley*, for the appellants, prayed for a re-hearing.

GARLAND, J. This case was before us at the October term 1840, 16 La., 294; has again been before us at the present term, and is a third time presented on an application by Brigham & Downs for a re-hearing.

The suit was commenced in September, 1839, on a promissory note, the plaintiff residing in a different parish from the defendants. At the first term, a continuance was obtained by an exception, that made it necessary for the plaintiff to produce her letters of administration. At the Spring term 1840, answers were filed by the applicants for a re-hearing, in which they did not deny the justice of the plaintiff's claim, but allege they are sureties, and that their principal is able to pay the debt. A judgment by default was taken against Caldwell, and a final judgment given against him and his securities, granting to the latter the benefit of discussion; from this judgment they all appealed. At the last term of this court, they brought up a defective record, the clerk having omitted to include in it the order entering a default against Caldwell. A *certiorari* had to issue to complete the record, and the defendants had a continuance for a year. On the first day of the present term, the amendment to the record was filed, and the cause fixed for trial on the third day, the counsel consenting thereto. The counsel for the plaintiff, in their answer to the petition of appeal, asked an amendment of the judgment so as to make Brigham & Downs directly liable. The parties proceeded to trial, and one of the defendants in his argument objected to amending the judgment, because the answer requesting it had not been filed three days before the day fixed for trial, according to article 890 of the Code of Practice, but at the same time went on with the argument, and insisted no judgment could be rendered against Caldwell, the principal, as it did not appear from the record, that his signature to the note had

been proved. This objection proved fatal to the plaintiff's claim against him, and the sureties then contended no judgment could be rendered against them, as the principal was discharged. We thought differently, held them bound, and deprived them of the plea of discussion, as the same record showed they had not entitled themselves to it.

They now apply for a re-hearing, because the answer was not filed three days before the argument. We cannot grant it. The appellants, by setting their cause for trial before the expiration of the three days which the appellee had to file her answer, has in our opinion waived any objection of the kind. When the cause was called, the three days allowed the appellee to file her answer had not elapsed, and it was not too late to do it under the system of practice pursued here.

The defendants have availed themselves of every technicality to delay the payment of this debt, and have finally been caught in their own toils; we shall not relieve them.

Re-hearing refused.

CHARLES PIPES *v.* ISAIAH GARRETT, Adm'r.

In an action against a party for the proceeds of certain *floats*, or pre-emption rights of settlers on the public lands, sold by him as agent for the plaintiff, the name of the settler, as well as the range, township, and section of the public land, on which the settlements were made, should be stated.

APPEAL from the Court of Probates for the parish of Ouachita, *Lamy*, J.

Copley and *Downs*, for the plaintiff and appellant.

Defendant, *in propria persona.*

MARTIN, J. This is an action against the estate of John M. Faulk for $1260, which the administrator declines allowing. The petition states, that the plaintiff claims from the said estate the proceeds of certain floats of the value of $1110, put into the hands of the deceased for sale, which were delivered to the latter, who undertook to dispose of them for the plaintiff's benefit, but for which he never rendered an account. The plaintiff further claims the amount of two notes, one for $50, due by S. Allen, and the other for $100,

due by S. Cheesborough, which the deceased also undertook to collect, and has never accounted for.

The defendant waived service of the petition, and admitted that these claims had been presented to him, but he had not thought himself authorized to allow them. There was judgment for the plaintiff for $45, and for the return of Cheesborough's note to him. The plaintiff appealed.

The sum of $45, for which judgment was given, is the proceeds of Allen's note, after deducting $5 for commission. The court of probates seems to have sustained the defendant's opposition to the plaintiff's claim for the floats, on account of the imperfect and indefinite manner in which it was set forth, not describing the floats as they might have been, by specifying the names of the persons who were the original settlers, and as such entitled to pre-emption rights, and also by stating the range, township and section on which the settlement was made. As these floats were *a hope*, (rather than a right,) which might be defeated by the inability of the purchaser to locate them, it was material, that the name of the settler should be given, for he was liable for the price he had received, if the purchaser failed in effecting a location.

It does not appear to us, that the court erred: especially as there is no other evidence of the plaintiff's claim respecting the floats, than a letter of the deceased, in which they are mentioned in a very vague manner.

The defendant amended his answer by a plea of the general issue; which required from the plaintiff full proof of his claim.

It appears to us however, that the rights of the plaintiff to the proceeds of these floats ought to be reserved to him, that they may be exercised hereafter, if he think proper.

It is therefore ordered, that the judgment of the court of probates be affirmed; reserving, however, the right of the plaintiff to claim the proceeds of the floats mentioned, in the same manner as if no suit had been brought; the costs of the appeal to be borne by the defendant and appellee.

Elizabeth Whatley v. Pascal Austin, Adm'r.

A judgment in a suit against an administrator, ordering a claim against the succession to be paid with privilege, though the question of privilege may have to be settled afterwards, contradictorily with the rest of the creditors, is final as to the administrator, and may be appealed from by him.

Mismanagement, or failure to pay over money received, gives no privilege upon the the property of an agent.

Privileges are only allowed where the law expressly accords them.

The privilege of a depositor is only upon the price of the thing deposited, where it has been sold.

It is of the essence of the contract of deposit, that the thing deposited is to be preserved and returned in kind.

Appeal from the Court of Probates for the parish of Catahoula, *Taliaferro*, J. The defendant was administrator of the estate of Thomas Bryan, deceased.

Garrett, for the plaintiff.

Phelps, for the defendant and appellant.

Garland, J. The plaintiff, in the year 1838, delivered to Bryan, a short time previous to his death, her crop of cotton, to be sold by him, and the proceeds paid to her. In this matter Bryan acted as the friend of plaintiff, she being unacquainted with business matters. The cotton was to be shipped to and sold in New Orleans, at the cost and risk of plaintiff. Bryan consigned the cotton to Messrs. A.Ledoux & Co., by whom it was sold, and it is admitted the nett proceeds amounted to $1115 61, which were placed to the credit of Bryan, who died before paying over any portion thereof to plaintiff. When Bryan's estate was inventoried, the sum of $701 83 was standing to his credit on the books of Ledoux & Co., and he had in cash $118. He also possessed a property inventoried at $62,204 38, more than half of which consisted of debts owing him as a merchant. In the record it is stated, 'it is feared, though not yet fully ascertained, that the succession of Bryan will prove insolvent;' and in the argument the insolvency is admitted.

Upon a statement of facts made and signed by the counsel of the plaintiff and defendant, the case was submitted to the probate judge, who gave a judgment for the plaintiff for the nett proceeds of the crop, and recognized the claim as a privilege against the succession;

to be paid as such by the administrator. From this judgment he appealed.

The plaintiff moves to dismiss the appeal, because, he says the judgment is not final, but merely interlocutory, and causes no irreparable injury, because the question of privilege must be settled hereafter, contradictorily with the other creditors. This may possibly be true; but so far as the administrator is concerned, the judgment is certainly final. It orders him to pay a certain sum, and allows the plaintiff a privilege for the amount. Because that judgment cannot be executed immediately, is not a reason why it is not final. The appeal must therefore be maintained.

On the merits of the case, the judge of the court of probates was correct in giving judgment for the amount claimed, as a debt owing by the deceased; but he erred in allowing it to be paid as a privileged debt. The art. 3152 of the Code is express, that privileges can only be allowed, when the law accords them in terms, and this court have so decided in many cases. From the evidence it is clear, that Bryan was only an agent of the plaintiff to sell her crop of cotton; it was put into his hands to sell and dispose of, not to be preserved and returned in kind, which is the essence of the contract of deposit. Civ. Code, arts. 2897, 2915. For mismanagement or failure to pay over money received, no privilege is given upon the property of an agent, and the privilege given to the depositor is only upon the price of the thing deposited, if it has been sold. Civ. Code, art. 2933.

It may be, if the plaintiff can prove that the funds on hand at the time of the death of Bryan, or those in the hands of Ledoux & Co., at that period, were the proceeds of her cotton, which Bryan had shipped, that she might claim the amount as being her property, and not forming a part of the succession, in which event she would have to enter any sum so recovered as a credit upon the present demand.

The judgment of the probate court is therefore reversed so far as it accords a privilege to the plaintiff for the amount claimed and adjudged to her, and affirmed so far as it relates to the sum ordered to be paid; the plaintiff and appellee paying the costs of this appeal.

Apphia Bronaugh v. Meraday Neal.

In doubtful cases the conclusion should be in favor of the party who strives to avoid a loss, rather than in favor of one who seeks a gain.

One sued as security on the promissory note of an insolvent, may plead in compensation and reconvention an amount of money due the principal debtor, in the hands of plaintiff, for which the latter had given no consideration; and interest will be allowed on it from the date of the judgment.

Appeal from the District Court for the parish of Rapides, *King*, J.

Thomas and *Ogden*, for the plaintiff and appellant.

Dunbar, *Hyams* and *Elgee*, for defendant.

Martin, J. The plaintiff claims of the defendant, as the surety of James Price, the sum of three thousand two hundred dollars, &c., on a promissory note. The defendant, among other pleas, claimed in compensation and reconvention the sum of one thousand dollars, which he alleges the plaintiff received from Price, the defendant's principal. The plaintiff had judgment for three thousand two hundred dollars with interest, &c., subject to a deduction of six hundred and three dollars, to take effect from the first day of January, 1839. The plaintiff appealed. The defendant has prayed that the judgment may be amended, so as to allow him the sum of one thousand dollars on the note sued upon, to take date from the 19th of October, 1837, instead of the credit of six hundred and three dollars, to take effect from 1st January, 1839, as allowed by the judgment. The plaintiff and appellant contends on her part, that the credit of six hundred and three dollars has been improperly allowed. And the only question submitted to us is, whether this allowance is to be sustained,or increased as required by the defendant and appellee. The statement of facts shows, that the plaintiff received one thousand dollars from Price, the defendant's principal and her debtor, on a verbal sale of two slaves, for which she promised to make title on the payment of the balance of the price; instead of completing this payment, Price clandestinely got possession of the slaves, and removed with them to the State of Mississippi. The defendant and appellee went with Goodwin, who was employed by the plaintiff and appellant, to pursue Price and regain possession of the slaves, which was obtained after a law suit,

and they are now with her. The district court deducted from the thousand dollars paid by Price to the plaintiff and appellant, the expenses she had incurred in the pursuit in the recovery of the slaves, and allowed the balance to the defendant and appellee in compensation and reconvention. Her counsel has contended that the court erred, as Price could not have recovered the money he had paid her as long as she was able and willing to perform her part of the contract, in part payment of which she had received it; and that the defendant and appellee can have no greater right against her therefor, than his principal, Price. The counsel of the defendant and appellee has replied, that it is in proof that she has received Price's money, and that if she has done so on a contract which Price cannot legally enforce against her, nor she against him, that it is in her hands without consideration, and that she cannot retain it without enriching herself at the expense of Price and the defendant and appellee. Had she not pursued Price for the clandestine abduction of the slaves, she might have legally enforced the contract by alleging a delivery of the slaves to him by her, which he could not contradict, and establish the same by propounding interrogatories to him; but this is now too late for her to do. It is a legal axiom, that in cases of doubt and difficulty the conclusion ought to be in favor of the party *qui certat de damno vitando*, rather than in favor of the party *qui certat de lucro captando*.

As to the time at which this allowance is to take effect, so as to stop *pro tanto* the interest recovered by the plaintiff against the defendant, three periods have been presented to us; the time when the plaintiff received the thousand dollars, the date of the plea in compensation and reconvention, and that of the judgment. The last appears to us the proper one, as it is the period of the liquidation of the debt.

It is therefore ordered, that the judgment of the district court be affirmed, but that it be so amended, that the allowance of $603 do take effect but from the date of the judgment appealed from; the defendant and appellee paying costs in both courts.

JACOB KLADY v. ROBERT F. MCGUIRE.

No appeal will lie from a demand for three hundred dollars, with interest from judicial demand.

THE defendant was sued before the District Court for the parish of Ouachita, *King*, J., for three hundred dollars, an amount received by him for the plaintiff from the treasurer of the State, as the compensation allowed by law for a negro slave belonging to plaintiff executed for a criminal offence, and for 'interest and costs of suit.' No period was mentioned from which interest was claimed. An exception by defendant that according to the allegations of the plaintiff he acted as his agent, and that the only action which could be brought by a principal against his agent was one for an account, was overruled; and he answered by a general denial, and further pleaded in compensation and reconvention claims to the amount of four hundred and eighty-two dollars, seventy-five cents, with interest. There was judgment of nonsuit, and the plaintiff appealed.

Copley and *Downs*, for the plaintiff.

Defendant, *in propria persona.*

MORPHY, J. The defendant and appellee moves to dismiss this appeal on the ground that this court has no jurisdiction, the amount in controversy not exceeding three hundred dollars.

The demand is for a sum of three hundred dollars alleged to have been received by defendant from the State treasurer for the account of plaintiff as the compensation for a slave of his executed for a criminal offence committed in the parish of Ouachita, and the petition prays for interest and costs; this claim is resisted by defendant, who denies the allegations of the petition, and sets up divers claims in reconvention.

It is clear that the plaintiff's demand was unliquidated, and that therefore no interest had accrued on it either before or since the inception of the suit. Code of Pr., art. 554.

Appeal dismissed.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

No appeal will lie from a demand which does not exceed three hundred dollars at the institution of the suit.

Copley, for a re-hearing, urged that art. 554 of the Code of Practice had been repealed by the act of 20th March, 1839, sec. 15, p. 168; that according to art. 2984 of the Civil Code he was liable for interest on the amount claimed from the time when he was requested to pay it over; and that the interest thus due would give jurisdiction to the court. I Mart. N. S., 138; 4 ib., 483; 5 ib., 88, 145, 185; 6 ib., 647; 8 ib., 122; 2 La., 439; 3 ib., 476; 6 ib., 323; 11 ib., 462. He contended that the plaintiff having moved to amend the judgment so as to make it final, as to the matters pleaded in compensation and reconvention, which exceeded three hundred dollars, that this alone would give jurisdiction to the court.

MORPHY, J. In this case a re-hearing is prayed for on the ground that the decision of the court is based on article 554 of the Code of Practice, which has been repealed by act of the general assembly passed on the 20th of March, 1839. This enactment was overlooked by us in drawing up the opinion, but even had it been brought to our notice, it could not have varied the conclusion to which we arrived in relation to the question of jurisdiction. The demand was one *not exceeding* three hundred dollars at the institution of the suit; no appeal could therefore lie. Civ. Code, art. 1932.

Re-hearing refused.

GEORGE W. COPLEY v. JOHN DOWELL, Executor, &c..

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A sale is complete as to the parties, as soon as the terms are agreed upon; but as to third persons, a delivery must take place before their rights can be affected.

On the sale or transfer of a debt, delivery is affected as to third persons by notice to the debtor of the transfer.

ACTION before the Court of Probates for the parish of Ouachita,

Leamy, J., against John Dowell, as testamentary executor of Nancy Strong, *alias* Kirkpatrick, and tutor of James Strong, her only child, for the sum of fourteen hundred dollars, being an amount alleged to be due to one John Morrison, for two years services as overseer on the plantation of the deceased, of which claim the plaintiff became the purchaser at a sale of the said claim by the sheriff of the parish of Ouachita, under a judgment in a suit of the plaintiff against said John Morrison. The petition alleges that the defendant and said John Morrison have connived together since the seizure of the claim, and have endeavored by giving receipts and making other acknowledgments to defraud the plaintiff out of the said claim. The defendant pleaded a general denial; and averred that John Morrison was in his employment from the 1st of January, 1839, to August, 1840, at a salary of four hundred and fifty dollars a year; that his employment ended by mutual consent at the latter period; and that he had paid him in full, which the plaintiff knew at the time of the purchase. The defendant excepted to the competency of the court to take cognizance of any charge of fraudulent connivance such as was alleged in the petition, which he contended was exclusively within the jurisdiction of the ordinary tribunals.

James Gleason proved that Morrison had been employed as an overseer by the defendant on the estate of his testatrix during the year 1839 and until some time in August, 1840. He thought his services worth five hundred dollars a year. A copy of the judgment, execution, and return in the case of the plaintiff against John Morrison was admitted in evidence; with copies of the will of Nancy M. Strong *alias* Kirkpatrick, and of the orders appointing the defendant executor and tutor. There was judgment in favor of the defendant.

Plaintiff, *in propria persona.*

McGuire, for the defendant and appellee.

Martin, J. The plaintiff is appellant from a judgment which rejects his claim against the estate of one Nancy M. Strong *alias* Kirkpatrick, deceased. It appears he purchased this claim for one dollar at a sheriff's sale on a credit of twelve months; being the claim of his debtor, Morrison, who had been employed as an overseer for more than a year, at the request of his deceased sister made

in her will, on a plantation which was part of her estate: but the plaintiff neglected to give notice of this purchase to the defendant, as executor of said estate, who in the mean while settled with Morrison, from whom he obtained a final discharge.

The petition alleges that this settlement and discharge were made and given by the connivance and fraud of the said defendant and Morrison, with the view of defeating the plaintiff's claim.

It does not appear to us that the court erred in rejecting this demand. A sale is complete as to the parties thereto, as soon as they agree on its terms. But as to persons not parties to it, a delivery must take place before their rights can be affected. On the sale or transfer of a debt, the delivery takes place by notice given to the debtor of the transfer having taken place. Civ. Code, arts. 2612, 2613.

The plaintiff in this case had acquired no right under his sale, against the defendant, at the time the latter settled with Morrison and took his discharge. If however he has any claim on the ground of connivance and fraud, it is not one which he can enforce in the court of probates against the defendant in his representative capacity. His remedy is against the defendant personally, and in a court of ordinary jurisdiction.

Judgment affirmed.

ZACHARIAH H. DORSEY v. JAMES PHELAN, Tutor, and another.

APPEAL from the District Court for the parish of Carroll, *Tenney*, J.

This was an action by the plaintiff against James Phelan, as tutor of certain minors, and John D. Harding, as sheriff of the parish of Carroll, for the purpose of enjoining the latter from selling certain negroes alleged to be the separate property of plaintiff's wife, which had been seized by him under an execution in a suit of the said Phelan against the plaintiff. The injunction was dissolved with damages, and the plaintiff appealed.

Copley, for the plaintiff.

Selby, for the defendants.

MARTIN, J. The applicant has put this case before us, on an assignment of errors, to wit:

1. The motion for a new trial was made before signing judgment, and never overruled.

2. The court erred in deciding that it was necessary that the order for the injunction should be made returnable to the district court.

3. The court should not have dissolved the injunction, because the plaintiff showed such facts as would entitle him immediately to a new injunction.

4. All judgments must be entered at length on the minutes of the court.

I. The record shows that the motion for a new trial was overruled on the same day the judgment was signed, and was consequently determined before final judgment.

II. The judge did not decide that the order for the injunction should be made returnable to the district court. On this point the counsel is in error.

III. It does not appear to us that the plaintiff was entitled to a new injunction. The clerk's certificate shows that parol evidence was introduced but was not taken down in writing and does not come up with the record; we are consequently unable to say whether or not it disproved the allegations on which the injunction issued.

IV. The judgment in this case appears to have been entered at length on the minutes of the court; and we are unable to discover any error in it.

Judgment affirmed.

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LEVI C. HARRIS, for the use of James H. Watson, v. JOHN S. and THOMAS ALEXANDER.

Service of citation must be accompanied with that of a copy of the petition; the latter is the only document from which the defendant can ascertain the demand with which he is required to comply.

Service of a copy of the petition must appear of record; no other evidence than the sheriff's return can be received to prove it. It may be waived by the appearance of the party.

A judgment will not be reversed on an assignment of error, where such error might have been cured by evidence legally admitted.

APPEAL by defendants from a judgment by default, before the District Court for the parish of Concordia, *Tenney*, J.

A. N. Ogden, for the plaintiff.

Stacy, for the defendants.

MARTIN, J. The defendants and appellants ask the reversal of a judgment by default made final against them, on an assignment of error apparent on the face of the record, which appears from the sheriff's return, in the following words: 'Served on the 16th September, 1840, by leaving a duly certified *copy of this citation* with the defendant, J. S. Alexander, *in person*, &c.; and served a duly *certified copy* on the other defendant, Thomas Alexander, in person at his domicil, &c.' Neither of the defendants appeared in the court below.

Their counsel contends, that they were not duly cited, because no copy of the petition was served on either of them. The Code of Practice, art. 185, makes it the duty of the sheriff to serve copies of the *petition and citation* on the defendant. The proof of this service is not a matter *en pais*. There can be no evidence of it but the sheriff's return, unless service be waived by the appearance of the party. The Code of Practice, art. 606, No. 4, provides 'that the defendant is entitled to an action of nullity, when he *has not been legally cited*, and has not appeared, &c.' The citation summons 'the defendant, either to comply with the demand contained in the petition, of which a copy accompanies the citation, or deliver his answer to the petition in the office of the clerk of the court, in which he is cited to appear.' *Idem, art.* 179, *No.* 4.

It is of the essence of the legal service of the citation and sum-

mons, that it be accompanied with the only document, by which the defendant may be informed of the demand with which he is required to comply, and of the matters to which he is to answer.

It has however been contended, that on an assignment of error no judgment is to be reversed, if the error assigned could have been cured by evidence legally admitted. This is true, and we have often so said. But we have just now stated that the service of a copy of the petition, being duly imposed on the sheriff, the best evidence of his having complied, is his return.

The service must appear by matter of record. No parol evidence of it can be received.

The clerk's certificate informs us, that the transcript contains all the proceedings of the court, and all the documents filed in the case, and in these we look in vain for any evidence of service of a copy of the petition. *De non existentibus et non apparentibus eadem est lex.*

It is therefore ordered, that the judgment of the District Court be reversed, the judgment by default set aside, and the case remanded for further proceedings according to law, the plaintiff and appellee paying the costs of this appeal.

JOHN KNIGHT v. SIMON MURCHISON—JANE MURCHISON, his Wife, Intervenor.

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A manifest evasion by a party to a suit to answer the interrogatories propounded to her, creates a violent presumption that a true and direct answer would destroy her claim, and amounts to such a neglect or refusal as will authorize the court to take them for confessed.

On a rule against a party to show cause on a certain day, why the interrogatories propounded to her by the plaintiff, should not be answered or taken for confessed, the court may, on failure of the party to appear or answer, make the rule absolute, and order the interrogatories to be taken for confessed at once, and without any further delay.

On a question whether due diligence has been used, the decision of the judge below will not be interfered with, unless clearly erroneous.

APPEAL by the intervenor from a decision of the District Court for the parish of Concordia, *Tenney*, J.

A. N. Ogden, for the plaintiff.

Stacy, for the appellant.

MORPHY, J. Jane Murchison, the wife of the defendant prosecutes this appeal from a judgment dissmissing her demand as an intervening party in this suit. She claims as her property three slaves named Lawrence, Nat, and Nancy, which have been attached as belonging to her husband. The petition of intervention sets forth that she purchased these slaves of Sarah Wheeling, in Hinds county, State of Mississippi, by act under private signature, dated the 1st of November, 1839, and that by the laws of that State, where she acquired them, she is entitled and empowered to acquire, own, and hold property in her own right, separate from her husband, and free from all his debts and liabilities; that her said husband having according to said laws the management and control of said slaves, sent them into the parish of Concordia, in the State of Louisiana, where they have been illegally and wrongfully attached at the suit of plaintiff to secure a debt alleged to be due by the defendant. She prays that the attachment be dissolved, that the slaves be decreed to be her property and that she recover of plaintiff two hundred dollars damages for the wrongful seizure of her slaves. The bill of sale for these negroes, which is in the form of a receipt for the purchase money and is signed by Sarah Wheeling, is annexed to the petition. The answer of the plaintiff to this intervention denies all the allegations therein set forth, and avers that the pretended sale from Sarah *Whiting* to the said Jane Murchison was a simulation, that she did not pay any part of the price therein mentioned, and had not then, or at any time previous, any separate estate or means of her own; that the property attached belongs to her husband, and that the sale was made to her to cover and protect it from the pursuit of his creditors. In order to substantiate these averments plaintiff prayed that the intervenor be ordered to answer the following interrogatories, to wit:

1. Is it not true as alleged in the above answer that no part of the price was paid by you to Sarah *Wheeling* for the negroes attached in this suit?

2. Is it not true that the receipt in question was given in your name to protect the property from the pursuit of your husband's creditors?

In the copy of the interrogatories and answer forwarded to the commissioner to be answered by the intervening party, the name of Sarah *Whiting* was inserted in lieu of Sarah *Wheeling* in the first interrogatory. Availing herself of this clerical error, which was apparent from the accompanying answer, which referred to the sale or receipt annexed to her petition and relied on by intervenor to prove her purchase from Sarah Wheeling, she answered,

To the first interrogatory: 'I cannot answer to this interrogatory only that I do not know Mrs. Sarah *Whiting*, never having had any dealings with her.'

To the second: 'Further witness knows not.'

Such a manifest evasion to answer the questions put to her when she could not have mistaken their purport, creates a most violent presumption that a true and direct answer to them would have destroyed her claim. It amounts, in our opinion, to such a neglect or refusal to answer as under article 349 of the Code of Practice, would have authorized the judge to have taken for confessed the facts concerning which she had been interrogated. Had this course been pursued, she would not have been listened to if she had pretended to have been ignorant of what was asked of her. Parties should not be permitted thus to trifle with the orders of courts of justice, and the obligations of their oath. 2 Martin, N. S., 56; 10 La., 416. But the plaintiff instead of taking advantage of the situation in which the intervenor had placed herself, moved the court on the 8th of June, 1841, to correct the clerical error in the answer and interrogatories, by inserting the name of *Wheeling* instead of *Whiting;* and she was ruled to show cause on the 14th, why the interrogatories propounded to her by the plaintiff should not be answered or taken for confessed. Personal service of this rule was made on her counsel on the 12th of June. No answer having been made on the appointed day, the judge ordered the interrogatories to be taken for confessed, and on the trial of the case rejected her claim. To this opinion of the judge, a bill of exceptions was taken on various grounds, tending to show that sufficient time had not been allowed to answer the amended interrogatories; and that at all events the only legal order that the court could have made was, that the interrogatories should be answered within a delay to be fixed subsequently to making the rule absolute, and in

default of answering that the interrogatories should be taken for confessed. We cannot say that the court erred. The evidence shows that the intervenor lived but a short distance from the court house, and the rule was only made absolute six days after it was taken. Of this rule the appellant's counsel cannot have been ignorant, and we think she had sufficient time to avail herself of the opportunity thus afforded her to give direct answers to the questions she had theretofore evaded answering. As to the order made by the judge on the trial of the rule, it might well be inferred from the language used, although not very explicit, that the interrogatories were to be answered on that particular day, or that they would be taken for confessed. Such seems to have been the understanding of the appellant's counsel himself, from the pains he took to satisfy the judge that he used proper diligence to have the answers made on that day. We have often said, that in questions of this kind, we will not interfere with the decisions of the inferior judges, unless they be clearly erroneous; they have better opportunities than we can have to judge of the motives which actuate the parties litigating before them.

Judgment affirmed.

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JACOB HOOVER, Tutor, v. JAMES Q. RICHARDS and Wife.

A petition may be amended so as to change the action from a possessory to a petitory one.

A sale *per aversionem* conveys all the land between the designated boundaries, without regard to the number of acres mentioned; but the sale of a tract of a certain number of acres, between certain limits, qualified by the expression 'so as to include the said number of acres,' will not be considered a sale *per aversionem*, but a sale of the number of acres specified.

IN this case the defendants appeal from a judgment of the District Court for the parish of Concordia, confirming the title of the minors represented by the plaintiff, to the land in question. *Pierse*, J., presiding.

Farrar and *Stacy*, for the plaintiff.

Lawrence, for the defendants and appellants.

BULLARD, J. This is a petitory action, in which the plaintiffs as-

sert title to a small lot of land, described as lot No. 31, township No. 3, of range No. 8 East, in the land district north of Red river, which they allege is unjustly possessed and detained by the defendants.

The defendants first excepted to the form of the action as neither petitory nor possessory, and at the same time pleaded the title of the wife. The petition was then amended by leave of court so as to make the action clearly petitory, the plaintiff praying for judgment on his title. The amendment was, we think, properly admitted. The plaintiff will be considered as having renounced his possessory action, and of this the defendant has no reasonable ground to complain, inasmuch as it makes him possessor until the plaintiff shall have shown a better title. Code of Pr., 54.

The defendants answered to the merits, and denying the plaintiffs' right, averred that the title to the lot of land in dispute had been confirmed to Thomas Harman by commissioner's certificate.

The plaintiffs exhibit a patent for the lot described in the petition, together with lot thirty-three in the same township and range, containing together 833 38-100 acres, in favor of Peter Little, dated January 19, 1833, and a sale from the grantee to John Hoover, and the last will of the latter, by which all his estate, real and personal, was bequeathed in equal and undivided proportions, to his wife and three sons, Elias, John W. and James Graham Hoover, whose tutor prosecutes this suit. It is also shown that the children inherited from their mother.

The plaintiffs therefore have shown a title in themselves of the highest dignity to the *locus in quo*, and it only remains to enquire whether the defendants have shown a better title out of the government, as averred by them.

They rely upon a commissioner's certificate, dated in 1811, confirming the claim of Harman to the land in controversy as part of a tract to which he had an inchoate title from the Spanish government. The certificate purports to confirm Thomas Harman in his claim to a tract of land containing three hundred and twenty superficial *arpens*, equal to 270 80-100 American acres, founded on a *requête* and permission to settle, &c., situated in the county of Concordia, on the west margin of the Mississippi river, *bounded on the upper side by land of Samuel Phipps, and on the lower by land of*

John Sandal, having a front on the river of about eight arpens, with the depth of forty, so as to include the aforesaid quantity of three hundred and twenty superficial arpents, having such forms and marks, natural and artificial, as shall be represented in a plat thereof to be returned by the principal deputy surveyor of said district, &c. It appears that when the survey was made with a view to locate the land confirmed to Harman, there was found between the lands of Phipps and Sandal more than 320 *arpens*, and that the remainder was returned as public land on the township plat, and subsequently bought of the government by Little, under whom the plaintiffs hold, who obtained the patent given in evidence.

It is urged by the defendants' counsel, that the commissioners confirmed the claim of Harman to all the land between Sandal and Phipps more or less, and that the title of the defendants is in the nature of a purchase *per aversionem*, in which this court has repeatedly held that all the land passes which is to be found between the designated boundaries, without regard to the enumeration of number of arpents.

Such is indeed the well settled doctrine in sales *per aversionem*, as recognized by this court in numerous cases, to which our attention has been called by the counsel. It is however not so clear that the present would be considered as a sale *per aversionem*, if the grantor had been an individual, and the sale intended to constitute the ultimate proof of title. The last expressions used, to wit: 'so as to include the aforesaid quantity of three hundred and twenty superficial *arpens*,' would seem to control the previous one setting out the adjacent proprietors and limiting the grant to a superficies of 320 *arpens*, situated between those two tracts. Be that as it may, we are clearly of opinion that the certificate was not final; that upon the return of a regular survey, according to the terms of the certificate, the claimant was entitled to a patent for 320 arpents only. It accordingly appears that when the claim was located, Harman got his quantity, and the patent of Little covers the rest of the land between the two tracts.

If the confirmation had been made with reference to and in conformity with a survey of Peter Walker, which is said to have been made in 1803, but not shown, and it had appeared that the whole of the land between the two adjacent proprietors, amounting to more

than 320 *arpens*, had been designated for the grantee, the case might have been different, and probably the title of Harman to the whole would have been regarded as complete from the date of the act of Congress confirming the report of the commissioners. It would have been a grant by Congress of a tract with definite and specified boundaries, which we held in the case of *Boatner* v. *Walker*, 11 La. 582, was equivalent to a patent.

But the case appears to us more analogous, so far as it relates to the location of it by the operations of the surveying department, to the case of *Slack* v. *Orillion*, 11 Idem, 590, in which we held that the patent must prevail.

Judgment affirmed.

JOHN K. DAUGHTERS, Administrator, *v.* LEVI GUICE and others.

Questions which have been decided in another action between the same parties, or between the plaintiff and the vendor of defendants, to whose rights the latter were subrogated, cannot be re-examined.

THIS was an action against Levi Guice, Henry H. Holstein, and Michael H. Dosson, before the District Court for the parish of Catahoula, *King*, J.

Mayo, for the plaintiff.

McGuire, for the defendants and appellants.

BULLARD, J. The plaintiff as administrator of the estate of James M. Daughters, deceased, seeks in this suit to annul a sale of a tract of land by one Guice, a debtor of his intestate, to the defendants, on the ground of fraud. He represents that he had obtained a judgment against Guice for $1250, with interest, secured in part by the vendor's privilege upon the land in question. That before judgment was rendered, and pending the suit, Guice, with a view to defraud him, and to prevent his collecting the amount of any judgment he might obtain, made a fraudulent conveyance to the defendants of the tract of land, it being all or nearly all the property he possessed. He alleges that at the time of the sale Guice was in failing circumstances to the knowledge of the pretended purchasers, who also knew of his fraudulent intent, and that no price was paid

for the property, and that an undue preference was given to the defendants as creditors. The defendants having first excepted on the ground that the plaintiff was not administrator, and that exception having been overruled upon the exhibition of the plaintiff's letters of administration ftom the court of probates, the defendants answered by denying the allegations in the petition; and the two purchasers allege that James M. Daughter, in 1835 entered into a written contract by which he bound himself to make to Levi Guice, on or before the 1st of January, 1836, a good warranted title to one hundred and seventy acres of land between Deer creek and Turkey creek, and to have two ferry boats, one on each creek, and also to have a new press put up worth $100, &c., all for the sum of $3500, of which $2000 were paid, and for the balance two notes given for $750 each, and that plaintiff had obtained judgment on the two notes. They aver that they purchased from Guice with a special subrogation of all his rights and actions against the estate of Daughters. They allege that Daughters and his representatives have failed to comply with their contract, though requested and put in default; that no title has ever been made to the land, and much of it has been entered by other persons, to their damage $1500. They further aver that fifty acres of the most valuable part never belonged to Daughters, and that he failed to leave the ferry boats, or make the repairs, as stipulated by him. They therefore pray that the sale from Daughters to Guice may be rescinded, the $2000 refunded, and that the judgment against Guice may be cancelled; and for damages, &c.

The plaintiff annexed to his petition certain interrogatories, to be answered by Holstein and Dosson, in relation to the payment of the price set forth in the conveyance to them, and their answers show that the price mentioned in the sale was not paid in cash, nor do they set forth distinctly in what manner the property was paid for.

The contract was by judgment of the court below, founded on the verdict of a jury, annulled and set aside as fraudulent, so far as it relates to the debt on which judgment had been pronounced against Guice, and the defendants appealed.

The defence set up by the purchasers, grounded on the failure of Daughters to comply with the stipulations of his contract, and that they had been subrogated to the actions of their vendor, cannot

avail them, because it is manifest from inspection of the record, that the same questions were settled by the judgment of the court in the case against Guice.

The question of fraudulent preference to the purchasers as the creditors of Guice, or of his insolvency to their knowledge, and whether the plaintiff was injured by the contract, were left to the jury upon the evidence, and we are unable to say that any thing in the record authorizes our interference.

Judgment affirmed.

SAMUEL R. FORD v. MICHAEL H. DOSSON.

The drawer of a note negotiated after maturity, may set up any equitable defence against the holder, which he could have urged against the payee.

In a suit by the holder against the drawer of a promissory note, negotiated after maturity, which had been given on the settlement of a partnership formerly existing between the drawer, the payee, and a third person, the defendant may be relieved by showing error in the settlement, without making his partners parties to the suit.

APPEAL from the District Court for the parish of Catahoula, *King*, J.

Downs and *Copley*, for the plaintiff.

McGuire and *Garrett*, for the defendant and appellant.

BULLARD, J. This is an action upon a promissory note against the drawer, made payable to McCluer or bearer, the plaintiff alleging that he is the bearer thereof.

The defence is, that the note was given in error on the settlement of a partnership concern, in which the respondent Dosson, S. W. McCluer, and Joseph Bealer were parties, and that the amount was ascertained by giving over to the defendant rights and credits belonging to the partnership to the amount of ten thousand five hundred dollars, which were worthless, and errors in calculation $3000. That he paid $3000 of the note to McCluer which he promised to credit upon it, and that the note was not to bear interest until after two years. That the plaintiff acquired the note after maturity, being well acquainted with the errors in the settlement. He further avers that the plaintiff is not the real owner.

The note having been evidently negotiated after maturity, the defendant was authorized to set up any equitable defence, which may have existed as between him and the original payee.

The defendant having failed in the opinion of the court below to make good his defence, or to show that he was entitled to any deductions, judgment was rendered against him, and he appeals.

His counsel have urged that the court below erred in refusing to make McCluer and Bealer parties to this action, according to the prayer of the amended answer He contends that the case involves the opening of a settlement between partners, and that in cases of that kind all the partners should be called in. It does not appear to us that the court erred. McCluer was the assignee of Bealer in relation to the concern, and we have already said that the defendant might be relieved by showing error, without making parties those with whom he was formerly associated and had had a settlement, and to whom he had given the note sued on. It is not easy to perceive how such a step would aid the defendant.

Upon the merits, the defendant failed to make out his defence. The evidence shows, that when the note was presented to him by the attorney of the plaintiff or his agent, he said the note was right, and he would make some arrangements to pay it. The deposition of McCluer and of his late partners and the assignee of the other, is far from showing the errors complained of; and the plaintiff, in answer to interrogatories propounded to him says, 'I have had repeated conversations with Dorson, the defendant in this suit, and he made no objection to the justness of the claim sued for in this action; on the contrary he admitted that he owed the debt, and endeavored to get this deponent to take other men's paper or notes, that he, Dorson, held in payment of this.'

Judgment affirmed.

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MAYBERY WAFER v. DAVID C. PRATT, Sheriff, and BERNARD HEMKEN.

Where a sheriff is in possession of property seized under execution, he must be considered a rightful possessor holding for the benefit of the plaintiff, until it is clearly shown that the property seized belongs to another than the defendant from whom it was taken.

The right of a third person to oppose an execution, is limited to the cases in which he owns, or has a privilege on the property seized; and in the former case he must make out a clear title in order to arrest the sale.

One who does not possess as owner cannot acquire a title by prescription.

Where vendor and vendee live in the same house, possession follows title.

APPEAL from the District Court for the parish of Claiborne, *Campbell*, J.

Downs, *Copley*, and *Friend*, for the plaintiff.

McGuire, for the defendant and appellant.

MORPHY, J. Plaintiff enjoined the execution of a writ of *fieri facias* under which the sheriff of the parish of Claiborne had seized and was proceeding to sell a negro man named Jim, as belonging to Joel Wafer, against whom defendant had obtained a judgment; he alleges that for several years past he has had the actual and quiet possession of the boy, and that he is the legal and equitable owner of him. The defendant moved the court that plaintiff be ruled to prove the allegations in his petition, and upon failure thereof that the injunction be dissolved with damages. The sheriff pleaded the general issue, averring that he seized the slave as the property of Joel Wafer, who claimed him as owner twenty years ago, and has continued to own him ever since, though he permitted the plaintiff, his brother, at whose house he frequently lived, to have the services of the boy and of other property of his, but that plaintiff never claimed to own this slave until the institution of defendant's suit against his brother, Joel Wafer, about one year ago. The judge below made the injunction perpetual, from which decree the defendants have appealed.

It appears to us from the testimony on record that the court erred. When the sheriff is in possession of property by virtue of a seizure under execution, he must be considered as a rightful possessor holding for the benefit of the plaintiff in the writ, until it be clearly

shown that the property seized belongs to another person than the defendant from whom it may have been taken. The right of a third party to oppose an execution is limited to cases where he owns the property or has a privilege on it. When the former ground is assumed, the person making the opposition is in the position of a plaintiff in a petitory action; he must make out a clear title, otherwise he must fail in his attempt to arrest the sale. Code of Pr., art. 396; 5 Martin, 268; 8 Martin, N. S., 661.

On the trial the plaintiff in injunction exhibited no title whatever to the slave in question; on the contrary, the evidence by him adduced shows that as far back as 1819 or 1820 Joel Wafer brought this slave to Arkansas as owner, before the plaintiff himself went to that State. That since then the plaintiff and his brother, Joel Wafer, have almost constantly lived together either in Arkansas or in Louisiana, and particularly during the last ten or twelve years. The long possession then which plaintiff has shown cannot avail him, because he did not possess as owner, and his possession was not exclusive. If he had acquired any title to the slave from Joel Wafer, his other brother Thomas Wafer, and his brother-in-law who testified as to his possession, could have proved it, as they lived together for a number of years; but as no transfer to plaintiff is shown of whatever right or title Joel Wafer originally had to this slave when he took him to Arkansas, we are bound to believe that plaintiff did not possess him as owner, and could not therefore acquire title to him by prescription. Civ. Code, arts. 3399, 3409, 3476, 3439.

We have held that when a vendor and vendee live in the same house, possession follows title. 3 Martin, N. S., 337. The testimony moreover shows that the plaintiff began to claim to be the possessor of the slave as owner only since his return from Arkansas in 1828; from which time the prescription provided for by art. 3439 has not taken place.

It is therefore ordered that the judgment of the district court be reversed; and proceeding to give such judgment as should have been rendered below, it is adjudged that the injunction be dissolved, and that the plaintiff and appellee pay costs in both courts.

JESSE STANBROUGH v. THOMAS B. SCOTT, Sheriff, and SILAS LILLARD.

An affidavit that the *allegations* in the petition are true, is a sufficient compliance with a law which requires that the *facts* stated in the petition shall be sworn to.

On an application for an injunction to the district court in the absence of the judge, the petition must be addressed to the judge of that court, and not to the parish judge, though the latter be applied to, under the act of 1835, to grant it.

It is not necessary in granting an injunction that the judge should state in his order into what court it is to be made returnable. It is the duty of the clerk to issue the writ according to law.

It will be no objection to an injunction bond that it was dated before the petition for the injunction was filed. It is enough that it be of sufficient amount, with solvent sureties, and such that the party in whose favor it is given, may maintain an action upon it.

Where an order by the parish judge, granting an injunction from the district court, recites that it was made in the absence of the district judge, such absence will be presumed.

THE defendant, Lillard, having obtained a judgment in the District Court for the parish of Madison, before *Tenney*, J., against David Stanbrough, certain slaves were seized by Scott to satisfy a *fieri facias* issued on that suit, and directed to him as sheriff of the parish of Madison. The plaintiff prayed for an injunction against any further proceedings by the defendants, alleging the slaves to be his property. The petition was addressed to the district judge for the parish of Madison; and the affidavit declared 'that the allegations set forth in the petition are true and in his opinion render an injunction necessary.' An injunction was granted by the parish judge. The order allowing it recited: 'that it appearing to the satisfaction of the parish judge of the parish of Madison that the judge of the district court for the said parish is resident out of and absent from the said parish,' &c., and directed 'that an injunction should issue as prayed for, on the petitioner's giving bond in a certain sum, conditioned as the law directs'. The petition for an injunction was filed on the 8th of May, and the bond was dated on the 5th of the same month. The injunction was dissolved.

Stacey, for the plaintiff and appellant.

Copley, for the appellees, prayed that the judgment of the lower

court might be amended so as to allow interest at ten per cent, and twenty per cent damages on the amount enjoined. He urged that the act of 2d April, 1835, p. 227, giving parish judges power to issue injunctions in the absence of the district judges, required that the injunctions so issued should be made returnable to the district courts.

Bullard, J. Lillard having recovered a judgment against David Stanbrough and others, caused a writ of *fieri facias* to be issued, which was levied by the sheriff upon certain slaves. Thereupon Jesse Stanbrough obtained an injunction to stay proceedings, on the allegations that the slaves seized were his property, and in his possession, and that his title to said slaves had been duly recorded.

The defendants moved to dissolve the injunction upon the following grounds: 1st. The affidavit is insufficient as it only attests the *allegations* of the petition, and does not attest that the *facts* set forth in the petition are true and correct. 2d. The petition was improperly addressed to the district court, it should have been to the parish judge. 3d. The injunction is not made returnable in the district court as required by law. 4th. The bond does not appear to have been properly executed, it bearing date five days before the petition was filed. 5th. There is no showing that the district judge was absent, which fact should have been made to appear by affidavit.

These exceptions appear to have been sustained and the proceedings dismissed. The plaintiff in injunction appealed, and assigns as error apparent upon the record, the sustaining of said exceptions. The appellee prays that the judgment may be amended so as to give him damages on the dissolution of the injunction, according to the act af 1831.

I. The petitioner made oath 'that the *allegations* set forth in the foregoing petition are true and in his opinion render an injunction necessary.' We cannot distinguish between the *allegation* of facts and the facts themselves, in the sense of the Code, which requires that *the facts* shall be sworn to. An *allegation* may be false or it may be true, as the *fact* exists or not—but, strictly speaking, a fact cannot be false—it is only the *allegation* of its existence which may be so. The affidavit was in our opinion sufficient.

II. The proceeding was in the district court, which had rendered

the original judgment, and upon which the execution had been issued. The parish judge was applied to in the absence of the judge of the district court, to grant the order for the injunction, but the petition was properly addressed to the court from which the plaintiff sought relief, and not to the officer appointed by law to act in the absence of the judge, whether the clerk of the court or the parish judge.

III. The writ which issued was made returnable in the district court and was issued by its clerk. It was not necessary, in our opinion, that the judge in giving his *fiat* should direct that the writ should be returnable in a particular court. It is the duty of the clerk to issue the writ, and it appears that he acted correctly.

IV. It is enough, we think, that the bond be of sufficient amount, with solvent sureties, and such as that the party in whose favor it is made may maintain an action upon it, if it should appear that the injunction was wrongfully sued out. The date of the bond may well precede the filing of the petition, and yet the bond be valid.

V. We may well presume that the parish judge knew of the absence of the district judge when he granted the order. His absence in point of fact is not denied, and the presumption is that the parish judge in granting the order did not exceed his powers.

We conclude that the court erred in sustaining the exceptions and dismissing the proceedings.

It is therefore decreed that the judgment of the District Court be reversed, that the injunction be reinstated, and the case remanded for further proceedings according to law, and that the appellee pay the costs of this appeal.

JACOB P. KIPER, Administrator, v. DITTO L. NUTTALL and THOMAS J. PENISTON.

Where a slave dies of a disease contracted since the sale, but before any redhibitory action, the loss must be borne by the purchaser.

Death from a congestive fever contracted since the sale, is a fortuitous event within the meaning of art. 2511 of the Civil Code.

Where a slave had been sick for several days, and no physician had been called until within three hours of her death, such neglect will prevent a recovery of her value, though she may have been affected with a redhibitory disease.

A purchaser is bound to take such care of the thing sold which he intends to return, as might be expected from a prudent father of a family.

THIS was an action by the administrator of the estate of Margaret Kiper, deceased, before the District Court for the parish of Catahoula, *King*, J.

Mayo, for the plaintiff.

Garrett, for the defendants and appellants.

MORPHY, J. This suit is brought on a promissory note. The defendants admit their signatures to the instrument sued on, Nuttall as principal, and Peniston as surety. But they aver that it was given in part payment of two negroes purchased by Nuttall at the probate sale of the estate of Margaret Kiper, deceased, with a full warranty against all redhibitory vices and maladies; that one of these slaves, a negro woman named Charlotte, was at the time of the sale unsound and laboring under a disease with which she had been long afflicted and which rendered her unfit for service; that the administrator and heirs knew the condition of this slave, but concealed it from the defendant; that the negro lingered from the time of the purchase, and about three months thereafter died of the disease with which she had been afflicted, although every reasonable effort was made to effect her cure. The answer concludes with a prayer that, as the price of said negro is equal to the amount claimed, the note sued on be cancelled and annulled, and that a sum of two hundred dollars be allowed in reconvention for the boarding, nursing and medical attendance of said slave. The inferior court rendered a judgment in favor of the plaintiff, from which the defendant appealed.

The testimony shows that the slave Charlotte was unhealthy at

the time of and before the sale to the knowledge of some of the heirs, but it is quite vague and unsatisfactory as to the nature of her disease. One of the witnesses calls it a female complaint brought upon her by an attempt to produce abortion; but even were we to consider the evidence as fully supporting the defence relied on, it could not, in our opinion, avail defendants in the present case. From the testimony of their own witnesses it clearly appears that Charlotte died of a congestive fever, a disease totally distinct from that under which she is represented to have been laboring before the sale. This new disease which occasioned her death, is as much a fortuitous event within the meaning of article 2511 of the Civil Code, as any sudden accident by which she might have perished. When the thing sold is thus destroyed, before the purchaser has instituted his redhibitory action, the loss must be borne by him. Far from any suit having been brought by Nuttall before the death of the slave, no complaint appears to have been made about her having been unsound, until after the inception of the present action. But leaving out of view the positive provision of law above quoted, the record discloses a circumstance alone sufficient to render unavailing the defence set up by defendants. The negro girl was taken sick with the fever from four to six days before she died; no physician was called in to attend on her except about three hours before her death, when the progress of the disease had in all probability rendered it impossible to save her. Such a neglect of the course and duties prescribed by humanity should, in our opinion, preclude a purchaser from recovering the value of a slave affected with any redhibitory disease; he is bound towards the vendor to take such care of the thing sold which he intends to return, as might be expected from a prudent father of a family.

Judgment affirmed.

SAMUEL C. FALKNER and Wife v. SAMUEL FRIEND, Executor.

The article of the Civil Code providing that a will written out of the presence of the witnesses shall be presented in their presence and declared by the testator to be his, does not require a manual presentation; it will suffice, if after the instrument has been read to him in their presence, he declares to them that it contains his last will.

The great difference between a nuncupative will by public act and one under private signature is, that the former must make full proof of itself, and bear on its face evidence that all the formalities necessary to give it validity have been complied with, while the latter need not mention the fulfilment of any formalities, it being sufficient if it appear when the will is admitted to probate, that they have been observed.

When all the requisites pointed out by law for the validity of a nuncupative will by public act do not appear from the instrument itself, the will must be declared null, because no omission to mention such requisites can be supplied by testimony.

The omission of a material circumstance in the probate of a nuncupative will under private signature, can only prevent its execution. It must clearly appear from the testimony that some of the formalities required by law in making such a will have been omitted, before it can be annulled.

To authorize the admission to probate of a nuncupative will under private signature, executed in the presence of only five witnesses, it must appear from the will or from testimony offered to the judge of the court of probates, that they resided in the place where the will is received, or that a greater number of witnesses could not be had.

APPEAL from the Court of Probates for the parish of Claiborne, *Peets, J.*

The plaintiff, Mary A. V. Falkner, was the only child of Francis Flournoy, deceased.

MORPHY, J. The plaintiffs are appellants from a decree ordering the execution of the last will and testament of the late Francis Flournoy, deceased. They have contended in this court that the said will which purports to be a nuncupative one under private signature, is null and void on a variety of grounds, of which the most material are:

1. That it does not appear to have been written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, or that the testator *presented* the paper on which he had written the will, or *caused it to be written out of their presence*, declaring to them (the witnesses) that that paper contained his last will.

2. That it does not appear to have been executed in the presence of five witnesses *residing in the place.*

The Civil Code provides for the validity of this kind of testament that it shall be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in presence of five witnesses *residing in the place* where the will is received; or of seven witnesses residing out of that place; or that it will suffice, if in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written, out of their presence, declaring to them that that paper contains his last will. Civ. Code, art. 1574. The will which the plaintiffs seek to annul comes under the second clause of this article. It does not clearly appear from the *process verbal* of the probate of this will that the testator *presented* it to the witnesses and declared it to be his; but we have held in the case of *Bouthemy* v. *Dreux et al.*, 12 Martin, 645, that the presentation of the will need not be manual, and that the law is complied with if after the instrument has been read to the testator in the presence of the witnesses he declares to them, as the evidence shows was done in this case, that it contains his last will and testament. The testimony does not show, however, that the testator *had caused it to be written out of the presence of the witnesses*, which circumstance is perhaps not immaterial, but upon which, however, we express no opinion, as the second ground appears to us well taken. Neither the will, nor the testimony received by the judge to prove it, shows that the five witnesses to whom the will was presented resided in the parish of Claiborne; their residence in the place not appearing, there should have been seven witnesses present; unless, as provided by article 1576, a greater number of non-resident witnesses than five could not be procured. The sufficiency or insufficiency of the number of witnesses present at the making of this will, depends on circumstances which may have existed, although they do not appear from the *process verbal* drawn up by the probate judge, to wit: the residence of the witnesses in the parish, or the impossibility of obtaining a greater number than five. It appears to us that the evidence which the probate judge had before him in relation to this will did not authorize him to decree its execution, but it does not necessarily follow that the will itself is null and void. The great

difference between a noncupative will by public act and one under private signature, is that the former must make full proof of itself, and bear on its face the evidence that all the formalities necessary to give it validity have been complied with, while the latter need not mention the fulfilment of any formalities. It is sufficient if when the will is probated, they appear to have been observed. From this difference it follows that when all the requisites pointed out by law for the validity of a will by authentic act do not appear from the instrument itself, the will must be declared null and void, because no omission in the mention of such requisites can be supplied by testimony; while the omission of a material circumstance in the probate of a nuncupative will under private signature can only prevent its execution, which should not be decreed until it has been regularly proved to have been made according to law. The validity of a will of this kind cannot be made to depend on the omission of the judge to put proper questions to the witnesses, who appear before him to testify in relation to the facts material to probate the will; it must clearly appear from the testimony that there has been an omission of some of the formalities required by law in the making of a will of this kind, before it can be annulled.

It is therefore ordered that the judgment of the court of probates decreeing the execution of the last will and testament of the late Francis Flournoy be reversed, and that this case be remanded for further proceedings, the defendant and appellee paying the costs of this appeal.

McGuire and *Downs*, for the plaintiffs and appellants.

Friend, for the defendant.

Constance Littell, Tutrix, v. Roger Banks Marshall and others.

Where a promissory note did not come into the hands of the plaintiff in the ordinary course of business, the maker may prove want or failure of consideration.

An agreement, though for an amount exceeding five hundred dollars, may be proved by a single witness without any corroborating circumstances, where it is not sought to be enforced as a covenant, but merely to be proved as a fact.

Action before the District Court for the parish of Avoyelles, *Boyce*, J., by the tutrix of the heirs of Moses Littell against Marshall as drawer, and John L. Garrett as endorser of a promissory note. From a judgment in favor of the plaintiff, Marshall alone appealed.

In this case written arguments were submitted to the court by *T. H. Lewis*, for the plaintiff, and by *Taylor*, *Swayze*, and *Cushman*, for the appellant.

Bullard, J. This is an action upon a promissory note against the drawer and one of the endorsers, instituted by the legal representative of the late Moses Littell as holder. It was made payable and negotiable at the office of discount and deposit of the Bank of Louisiana at Opelousas, at twelve months after date. Marshall, the drawer, admits his signature, but avers that he is not bound to pay the note, the consideration for which it was given having failed. He alleges that at the date of the note he and Littell, the ancestor of the plaintiffs, were joint owners of a tract of land on the west bank of the Atchafalaya, in the parish of Avoyelles, about a mile below the mouth of the Bayou des Glaises, containing about six hundred and ten acres, he having acquired his half by purchase from one William D. Mayes. That Littell proposed verbally to sell him his undivided half for fifteen hundred dollars, and offered to take his note for the amount of the purchase, adding interest for twelve months, and made payable at the Bank of Louisiana at Opelousas, which he was to have discounted in Bank and the proceeds applied to the payment of the land; that the respondent assented to this proposition, and that the note was executed, and is the same now sued on. It was expressly understood, that as soon as the note could be discounted, Littell was to make a sale of his undivided half of said tract of land; but before the note could be dis-

counted, Littell died without making any sale of said land. He therefore prays, that the note may be ordered to be given up to him. The endorsers made no defence, and judgment having been rendered for the plaintiff, the defendant appealed. One witness testified upon the trial, that in 1837 he was at the defendant's, and that Littell was there. That Marshall and Littell were speaking about a tract of land owned by them jointly near the Atchafalayas. That Littell handed to Marshall the title papers for the land, and proposed to sell him his half for fifteen hundred dollars, but Marshall said he had not the money. Littell said he would enable him to obtain the money, and that if Marshall would have a note made out for an amount payable in Bank, so that when it should be discounted it would give fifteen hundred dollars, and get as endorser W. E. M. Wells, he would endorse it, and try and get it discounted in Bank. That if the note should be discounted so as to obtain the money, Littell would make him a conveyance of the land; otherwise it should be returned to Marshall. The note was then delivered by Marshall to Littell. The witness did not recollect that Wells was there. He understood from Marshall and Littell, that they had had other transactions about land, but thinks they had been settled. Understood that Marshall and Mayes had various transactions for land. It is shown that the note was endorsed by Wells, and that the body of the note is in his handwriting. The defendant further gave in evidence, a conveyance from Mayes to himself of one undivided half of the tract of land. He also gave in evidence sundry certificates of purchases of public land by Littell and Mayes jointly, amounting to 607 49-100 acres, probably the same land described as situated on the Atchafalaya, one undivided half of which it is averred was to have been sold to the defendant Marshall. It does not appear that the note has ever been discounted. The plaintiff contends that evidence of a failure or want of consideration cannot be received against her, being a *bona fide* endorsee before maturity of the note and without notice. All the circumstances which are shown in relation to the note sued on, render it more than probable, that it did not come into the hands of the plaintiff in the ordinary course of business. It is made not merely payable, but negotiable in Bank, and was not so negotiated. It is endorsed in blank. Under these circumstances we are of opinion,

the maker has a right to make proof of the want or failure of consideration, and that the parole evidence which appears to have been received, subject to all legal exceptions, was admissible. The witness, whose testimony we have stated substantially, stands unimpeached. It is corroborated by the fact that Littell and the defendant Marshall were co-proprietors of a tract of land. The defendant gave in evidence the title papers which were handed to him at the time of the agreement, and he exhibits a conveyance from Mayes, the original partner of Littell in the purchase from the United States. The note exceeds by a few dollars only the amount which when discounted in the Bank of Louisiana at twelve months, would give fifteen hundred dollars, the alleged price of the land. But it is argued by the plaintiff's counsel, that the testimony of Van Ness was inadmissible, because it goes to prove an agreement for the sale of land by parole, which is forbidden by the Code. If the title to land were to be affected by the judgment in the present case, unquestionably the evidence would be inadmissible. But whatever may be the result in the present case, Littell's title will remain undisturbed. It is further urged that, even admitting the defendant's right to prove by parole the agreement set up in the answer, yet the amount exceeding five hundred dollars, it cannot be proved by a single witness without corroborating circumstances.

To this it may be answered, that the agreement is sought to be proved not as a subsisting covenant which the party seeks to *enforce*, but merely as the inducement to another contract, the performance of which is demanded of him. He seeks to prove the agreement like any other *fact*, constituting in reality a suspensive condition to the contract relating to the payment of the note. But even supposing this one of the cases contemplated by that part of the Code relied upon, we have already adverted to several circumstances, such as the existence of the note itself, endorsed by Wells, negotiable in Bank, the joint ownership of the land, and the possession by Marshall of the original evidence of title, which we think strongly corroborative of the testimony of Van Ness.

It is therefore ordered, that the judgment of the district court be reversed, and that ours be for the defendants with costs in both courts.

James Dick and others v. Hugh W. Dunlap.

Surviving partners cannot sue alone for a partnership debt. The representatives of the deceased partner must join in the suit.

Appeal from the District Court for the parish of Madison, *Tenney*, J.

In this case James Dick, William J. McLean, and Henry R. W. Hill filed a petition for an order of seizure and sale, as surviving partners of the house of N. & J. Dick & Company.

Copley, for the defendant and appellant.

No counsel appeared for the plaintiffs.

Bullard, J. The plaintiffs styling themselves surviving partners, and trading under the firm of N. & J. Dick & Co., obtained from the judge of the ninth district an order of seizure and sale, upon exhibiting an authentic copy of a judgment rendered in the state of Mississippi against the defendant.

The defendant made opposition to the proceeding on various grounds, and among others, that the plaintiffs are not authorized to sue as surviving partners, and the opposition being admitted, the sheriff was enjoined from further proceedings, but without any security being given on the part of the defendant, he being exempted by the order of the judge from giving security.

Before the court had acted upon this opposition, or any issue had been joined upon it, the defendant applied to the district judge for leave to appeal from the order of seizure and sale itself, and it was allowed, returnable to the present term, and bond was given as required by the order of the judge.

The appellant urges that according to repeated decisions of this court, surviving partners have no capacity to sue for a debt due to the partnership, and that consequently the order of seizure issued improvidently and illegally. We cannot consider the question open. 6 La., 683. 7 Id., 194. 13 Id., 484.

This objection being fatal, it is not necessary to examine other alleged errors in the proceeding.

It is therefore ordered that the judgment directing the executory process to issue be rescinded, and that the writ be quashed and set aside, and that the plaintiffs pay the costs in both courts.

Richard L. Cawthorn v. William N. T. McDonald.

A defendant will not be allowed to amend his answer for the purpose of citing third persons in warranty, whom he alleges to have placed the slave sued for in his possession, when he does not pretend to have any recourse, nor asks for any judgment against them.

Where the signature to a power of attorney was proved by a witness who was sworn without objection, it will be too late to object on an appeal that the subscribing witness should have beeen produced.

The acknowledgment of delivery made by the vendor of certain slaves in the deed of sale, is sufficient against a naked possessor, without title.

Appeal by the defendant from a judgment of the District Court for the parish of Ouachita, *Boyce*, J., in favor of the plaintiff.

McGuire, for the plaintiff.

Copley, for the defendant.

Bullard, J. The plaintiff sues for a slave named *Sam*, whom he alleges he purchased on the 21st of October, 1839, of John J. Fisher, by act before the judge of the parish of Ouachita, duly recorded. He avers that the defendant has the slave in his possession, but refuses to give him up, to his damage, &c.

The defendant denies all the allegations in the petition, and especially that the plaintiff is the owner of the negro man mentioned in his petition. He avers that the slave in question was seized by the sheriff of the parish of Ouachita on an order of seizure and sale, issued at the suit of Lake & Petty against John J. Fisher, from the district court of Ouachita, and was left by the sheriff in his possession, and that he possesses said property as the agent of the sheriff only, and that the plaintiff has no right nor title to the negro sued for.

The defendant afterwards moved to amend his answer so as to aver that the slave was originally put in his possession by Lake & Petty, and was levied on by the sheriff in virtue of an order of seizure and sale in their favor against Fisher, and for leave to call in warranty the sheriff as well as the said Lake & Petty, and that curators *ad hoc* be appointed to represent the absentees. This motion was overruled, and he took his bill of exceptions. We are of opinion the court did not err. The defendant does not pretend that he has any recourse in warranty against the persons who are

alleged to have placed the slave in his possession, nor does he ask any judgment against them. They were at liberty to intervene if they saw fit, in order to protect their own rights.

The evidence shows that H. M. Bry, as agent of J. J. Fisher, sold the slave in question by authentic act, on the 21st of October to the plaintiff. That an order of seizure and sale issued on the 29th of the same month, on a judgment recovered by Lake & Petty against Fisher in the state of Mississippi, but which was recorded in the office of the recorder of Mortgages, on the 21st of October, 1839, previously to the issuing of the order of seizure or summary execution, that order itself not appearing to have been recorded. It appears further that under that summary execution the sheriff levied upon the slave together with others, but that Sam together with one other, were released from the seizure by the sheriff, who refused to sell them because they had been sold by Bry, as agent of Fisher, previously to the issuing of the writ. The other slaves, five in number, were sold by him. It appears that all the slaves were brought from Mississippi by Petty, one of the partners of Lake & Petty, who stated that being a creditor of Fisher, and apprehensive that Fisher would run the slaves off, he had taken the start of him and run them off himself, and placed them in the hands of McDonald.

The appellant contends that the letter of attorney from Fisher to Bry has not been duly proved; that the subscribing witness should have been produced. His signature is proved to be genuine by a witness who was sworn and testified without objection. It is now too late to complain that the best evidence was not produced.

It is further contended that Lake & Petty by the seizure acquired a lien upon the slave, and that the sheriff ought to have proceeded after Cawthorn dismissed his opposition, although the return day of the writ was past. To this it may be answered, that the proceeding instituted by Cawthorn against Lake & Petty had no longer any object, and the sheriff had no longer authority to act. Of this the defendant has no right to complain, as he does not represent Lake & Petty, who were originally wrong-doers, and their possession a tortious one as it relates to Fisher.

The deed from Bry, as agent of Fisher, acknowledges a delivery of the slaves sold. This was clearly sufficient so far as the defen-

dant is concerned, who is a naked possessor without the shadow of right to the slave in question, and who has no capacity to avail himself of any pretended rights of Lake & Petty.

Judgment affirmed.

RICHARD L. CAWTHORN *v.* DANIEL MCDONALD.

APPEAL by the defendant from a judgment of the District Court for the parish of Ouachita, *Boyce*, J.

McGuire, for the plaintiff.

Copley, for the defendant.

BULLARD, J. This case cannot be distinguished from that of the same plaintiff against Wm. N. T. McDonald, just decided. It relates to the slave *Stephen*, sold at the same time and under the same circumstances.

Judgment affirmed.

ALLEN D. RATCLIFF *v.* INGEODOZEAR C. BRIDGER.

Improvements made on the public lands may be sold, and are a good consideration for a note, though such sale gives no title to, nor any lien or privilege upon the land independently of the rights conferred by the laws of the United States.

APPEAL by the defendant from a judgment of the District Court for the parish of Caldwell, *King*, J., in favor of the plaintiff.

Mayo and *Garrett*, for the plaintiff.

McGuire and *Ray*, for the defendant.

GARLAND, J. The defendant being sued on his promissory note for $2000, pleads that he was induced to sign it by the fraudulent and false representations of the plaintiff, who pretended to be the owner of valuable improvements upon public land upon Long Lake, in the parish of Caldwell, which he sold defendant. He says these improvements were not worth $200. He says there was error on his part, fraud on the part of plaintiff, and no consideration for the note.

We find in the record a sale in writing from plaintiff to defendant of all his claims and improvements on Long Lake upon the public domain, it being distinctly understood and expressed at the time, that the land, for which the note was given, belonged to the United States.

The defendant endeavored to prove the improvements were not worth as much as he promised to give for them, and contends that the sale of them was illegal, as the parties expected a pre-emption right might be obtained at some future day. Nothing is said of a right of pre-emption in the sale, and if Bridger ever gets one, it will be by virtue of his settlement, and not of the purchase made from plaintiff. The evidence in relation to the value of the improvements varies a good deal as to their value, but there is no plea of lesion. We are of opinion that improvements made on the public land may be sold, and form a good consideration for a promissory note, but such sale gives no title to or lien or privilege upon the land, independent of the rights conferred by the laws of the United States. 16 La., 232.

The defendant complains most ungraciously of the sale made to him by the plaintiff. We see from the evidence, that he purchased of the plaintiff four or five improvements; he has by an authentic act sold three of them to a man named Holt for $2000; he occupies the others, and now coolly turns upon his vendor and charges him with fraud for doing what he has himself done. We will not countenance such conduct.

Judgment affirmed.

CEPHAS DUVAL v. JOHN H. KELLAM.

The answer cannot be amended after the case has been called for trial.

It will be no defence to an action by the payee of a note, that it was taken by him for a debt due to an estate of which he had been administrator, and had, on a settlement of his accounts in the court of probates, and a subsequent partition among the heirs, been assigned to one of them, where there is no evidence that the plaintiff seeks to avail himself of the suit to the injury of the latter. The transfer being a matter of record, the defendant will be discharged by payment to the heir.

THIS case was tried before the District Court for the parish of Ouachita, *Boyce*, J.

Garrett and *Copley*, for the plaintiff.

McGuire, for the defendant.

MARTIN, J. The defendant is appellant from a judgment on his promissory note, given to the plaintiff for the purchase of some property, part of an estate of which the plaintiff was administrator.

The defendant first urges as an exception the prematurity of the suit, as he was the plaintiff's surety in the administration bond, and there was considerable danger of his becoming liable for his maladministration. He further urges that the plaintiff was insolvent, and the exception concludes with the allegation of the plaintiff's promise not to institute suit on the note, until he had indemnified the defendant or relieved him from his suretyship. He made an unsuccessful attempt to establish this last allegation by an appeal to the plaintiff's conscience. The exception being overruled, the defendant filed an answer in which he admits his signature, and avers the plaintiff was not the owner of the note; that on a settlement of his account as administrator of one Hagler's estate, he has surrendered this note with others in the probate court, and a partition has been made of them, and the one in suit has fallen to the share of some minor heirs of said estate, of whom the plaintiff is not the tutor; that the plaintiff is therefore without interest in the note, and payment to him would not discharge the defendant.

When this case was called for trial, the defendant moved for leave to file an amended answer, calling on the plaintiff to answer interrogatories, which was refused, and he took his bill of exceptions. There was judgment against him, and he appealed.

It appears to us the exception was correctly overruled, as none of the facts set forth were proven. Leave to file an amended answer at the time when the cause was called for trial, was properly refused as coming too late.

The record shows that in the settlement of the plaintiff's account in the court of probates, the note now sued on was stated to remain unpaid and in suit against the present defendant. In the partition which soon followed, this note, with other effects, was given to one of the heirs. This heir acquired with the note the right of the plaintiff in the present suit, which was brought for its recovery. The transfer of this right is a matter of record, which would enable the defendant to discharge himself by payment to the heir, or repel

the claim of the present plaintiff, if he sought to avail himself of the present suit against the defendant to his injury, and that of the heir to whose share the note has fallen. He has therefore shown no good reason or defence against his paying the note.

Judgment affirmed.

ALEXANDER LAZARRE *v.* WILLIAM PATTERSON SNOW.

The period after the lapse of which no appeal will lie, is to be computed from the day when the judgment was rendered; not from that on which it was notified to the party against whom it was given.

THIS is a case from the District Court for the parish of Caldwell, *Wilson*, J.

Garrett, for the plaintiff.

McGuire and *Ray*, for the defendant.

MARTIN, J. The dismissal of the appeal is prayed for on the ground that it was not taken within a year from the rendition of the judgment. The latter was signed on the 8th April, 1840, and the appeal was granted on the 12th April, 1841.

It is true the judgment was not notified to the defendant until the 13th April, 1841, and the appeal had been granted the day before. The judge's fiat expressly states that the appeal bond is to be given for $1600 for a suspensive appeal, and for $200 if only a devolutive appeal is taken. The bond was accordingly executed for the larger sum.

The Code of Practice, article 575, provides 'that if the appeal has been taken within ten days, not including Sundays, *after* judgment has been *notified* to the party cast in the suit, it shall stay execution and all further proceedings until a definitive judgment be rendered on the appeal, &c.' It is contended that this clause authorizes a suspensive appeal if applied for within ten days after the notification of the judgment; and that the appellant might well wait to take measures for the suspension of the appeal until the appellee manifest his intention to execute the judgment by giving notice of it; and that the latter must impute the delay in the applition for the appeal to his own *laches*. This would be correct

reasoning if there were not another article in the Code of Practice which fixes a time, after which no appeal, suspensive or devolutive, can be taken. The article 593 expressly says that 'no appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered, &c.' In the case of minors the time is to be computed from the day of their becoming of age. Ib., 593. This precludes the idea that the computation of time is to be made from the date of the notification of judgment.

Appeal dismissed.

WILLIAM M. LAMBETH and another *v.* GEORGE H. CALDWELL and others.

The want of a seal to the certificate of a notary, will be no objection to its admission in evidence. No law requires that a notary shall furnish himself with a seal.

The holder of a note may sue the last endorser, though the maker and previous endorser be solvent.

THIS was an action before the District Court of the parish of Ouachita, *Boyce*, J., by the plaintiffs, composing the commercial firm of Lambeth & Thompson, against Caldwell as drawer, and James H. Brigham and Solomon W. Downs, as endorsers of a note.

MARTIN, J. The defendants are appellants from a judgment against them as maker and endorsers of a promissory note; on the plea of the general issue by the endorsers, and on a judgment by default made final against Caldwell, the maker.

The judgment by default against the maker was correctly made final; his attorney having declared on oath, '*that all the signatures on the note were genuine.*'

The signatures of the endorsers were proved by the above mentioned witness, and by others.

Our attention is drawn to a bill of exceptions taken to the admission in evidence of the certificate of the notary, attesting notice to the endorsers, on the ground that no seal is affixed thereto.

We are acquainted with no law requiring notaries to furnish

themselves with seals. It is true, the general and perhaps universal practice is for such officers to have seals, and to affix them to their certificates. This practice is certainly laudable, but nothing authorizes us to say, that the absence of a seal on the certificate of a notary, can prevent its admission when offered in evidence.

It does not therefore appear that the court erred in receiving the notary's certificate in evidence, as proof of notice.

Downs, one of the endorsers, urges that the judgment is erroneous, because he is the last endorser, and is only liable in the event of the insolvency or failure of the first or preceding endorser to pay the note.

It was never doubted until now, that the holder of a bill or note might sue his immediate or last endorser, although the maker of the note and all the other endorsers were perfectly solvent.

It is therefore ordered that the judgment of the district court be affirmed with costs in both courts, and five per cent damages as to the defendant Caldwell; and that it be affirmed with costs as to the other two defendants, Brigham and Downs.

McGuire, for the plaintiffs.

Copley and *Downs*, for the defendants.

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JOSEPH A DUMARTRAIT, Administrator, and others *v.* APPLETON GAY and another.

Ordinary partners are not bound *in solido* for the debts of the partnership; nor can one partner bind the others unless authorized to do so, either specially, or by the articles of the partnership itself, or unless it be proved that the partnership was benefited by the transaction; and the burden of proof rests on the party who seeks to be paid.

ACTION before the District Court for the parish of Avoyelles, *Boyce*, J., by Joseph A. Dumartrait, administrator of the estate of L. Lastrapes, and Alphonse Desmare and Henderson Taylor, surviving partners, against Appleton Gay and Charles D. Brashear.

MORPHY, J.* The plaintiffs, formerly commission merchants in New Orleans, claim $1479 72 on an account current for sundry

* GARLAND, J., did not sit in this case, having been engaged as counsel for the plaintiffs.

advances made, and drafts accepted and paid by them for and on account of defendants who, they allege, were ordinary partners pursuing the business of planting and cultivating cotton in the parish of Avoyelles, under the name and style of Gay & Brashear. They ask for judgment *in solido* against the defendants for the said amount; and, in the alternative, for a joint judgment. Gay, although legally cited, made no answer to the petition; but Brashear, the other partner, joined issue, admitting that an ordinary and particular partnership had existed, as alleged, between him and Appleton Gay, but denying his liability to pay any part of the debt sued for, and particularly two drafts drawn by Gay in the name of the partnership, one of $631 64, in favor of Silas F. Thomas, and one of $1355 43, in favor of James Lansing, because they were drawn by Gay without authority from him; and because the partnership was never benefited by the transaction, the drafts having been given for the private and individual debts of the said Gay. The answer concludes with a prayer for a judgment in reconvention against plaintiffs in the sum of $500, which would be the balance against them after deducting from their account the two contested drafts. The inferior court rendered a judgment in favor of Brashear, from which plaintiffs have appealed.

The rights and obligations of the members of a special and limited partnership are clearly defined in the Louisiana Code. It provides, article 2843, that 'ordinary partners are not bound *in solido* for the debts of the partnership, and that no one of them can bind his partners, unless they have given him power so to do either specially, or by the articles of the partnership.' It further provides, article 2845, that 'if a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or in that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction.' These provisions show how widely different an ordinary partnership is, under our Code, from a commercial one, as regulated by the law merchant, or even a special partnership under the english law. In both of the latter the power and authority of one partner to bind the others, in transactions relating to the joint concern, are implied from the fact of partnership, while in the former an express power must be shown, or positive

proof given, that the partnership has been benefited by the debt contracted in the name of the partnership by one of its members.

In the present case there is no evidence, that Gay was empowered, either specially or by any articles of co-partnership, to draw the two contested drafts, or that the debt enured to the benefit of the partnership; and it appears that shortly after these drafts were accepted by the plaintiffs, defendant called at their counting house, and informed a gentleman there, who, the witness supposed, was interested in the concern, that his (defendant's) partner Gay had given drafts on their house in their joint names for his own concerns, which he would not pay, and gave him notice not to accept any more drafts, unless drawn by himself.

It is contended, that under a proper construction of the two articles of the Civil Code above quoted, the burthen of proof that the debt was contracted for the individual account of Gay, must rest on the defendant; that the debt being contracted in the name, and apparently for the benefit of the partnership, the law never intended to impose on third persons, as a pre-requisite to recover, the duty of showing that it was not for the account of the individual partner, or that he had authority to bind his co-partners; that such a condition precedent would greatly obstruct and embarrass the the operations of commerce, and strike at the very foundation and existence of limited and ordinary partnerships.

This construction, and the argument on which it is based, cannot receive our assent. It rests on a presumption which does not exist in ordinary partnerships, as constituted by the Code, to wit: that all debts contracted by a member of such a partnership are authorized by, and are for the account of his co-partners. When the co-partners in an ordinary partnership deny that they are liable for a contract made by one of them, the creditor, who seeks to hold them responsible under it, must prove one of two things, either that the contract was authorized by them, or that it enured to their benefit. In this we cannot see any great hardship. It is the duty of every one who deals with a member of an ordinary partnership who shows no authority to bind his co-partners, to know at his peril, that the transaction is to enure to the benefit of the partnership. A different construction appears to us contrary to the spirit and letter of the above quoted provisions of our Code, as well as to our uni-

form adjudications on the subject. 5 Martin, 684; 1 La., 390; 6 Id., 304; 13 Id., 197; 14 Id., 364; and 15 Id., 496.

It is next urged, that before the date of the two contested drafts, Gay had drawn one for $587 95, which is admitted to have been for partnership purposes; and that from this circumstance it must be inferred, that Gay had authority to draw for the wants and for the account of the partnership as well as Brashear. The evidence shows, that this draft was the only one which had been drawn by Gay, whose particular business, says one of the witnesses, was to attend to making and gathering the crops. The knowledge of its having been drawn, is not brought home to the defendant. Had there been several drafts drawn to the knowledge of this defendant, without any notice on his part to the plaintiffs, that Gay had no authority to bind him, it might perhaps have been said, that such a course of conduct had misled the plaintiffs into the belief that he had authority from defendant, and should render the latter liable; but where, as in this case, a single draft has been drawn, and it is not shown that defendant knew it at the time, no inference whatever can be drawn from this circumstance. But even if defendant were shown to have known of this single draft, it might be that he authorized it, and Gay's authority was not called for by the plaintiffs; at all events we are not prepared to say, that his silence would render him responsible to an unlimited amount for debts subsequently contracted in the same way, when the law positively provides that in an ordinary partnership one partner cannot bind his co-partners, without being specially empowered so to do. The defendant might well have supposed, that no other draft would be accepted by the plaintiffs without requiring Gay to show his authority, even if he had known, that the first one had been paid without any inquiry.

The appellee has prayed for an amendment of the judgment below, which disregards his reconventional demand. In this, we think that there is error; the defendant should have been allowed one half of the balance which remains due by the plaintiffs to the partnership, after deducting the two contested drafts, to wit: the sum of $250.

It is therefore ordered, that the judgment of the District Court be reversed, and that there be judgment in favor of the defendant

in the principal action. It is further ordered, that the said defendant recover of the original plaintiffs the sum of two hundred and fifty dollars with costs in both courts.

Swayze and *Taylor*, for the plaintiffs and appellants.

Cushman, for the appellee.

ALEXANDER L. DEBLIEUX and another *v.* CHARLES A. BULLARD and another.

Notice of protest may be given on a Sunday, or day of public rest, or holyday; but the endorser is not bound to open the letter containing the notice, or to act on it, until the next day.

Under the act of 14th February, 1821, the certificate of a notary will not be sufficient proof of notice of protest, unless attested by two witnesses.

ACTION by A. L. Deblieux, and James Bludworth, testamentary executor of Charles Pavie, deceased, against Charles A. Bullard and William Long, before the District Court for the parish of Natchitoches, *Campbell*, J.

MARTIN, J. The defendants are appellants from a judgment against them as maker and endorser of two promissory notes. They pleaded the general issue only. The maker has made no defence in this court. His plea admits his signature to the note, and a close examination of the record has not enabled us to discover any ground on which the judgment against him may be disturbed. His co-defendant, Long, who is the endorser, has urged that notice of protest of one of the notes was given to him prematurely. It became due on the 1–4th July, 1838; was correctly protested on the 3d, but *notice* was given to him on the 4th of July, which by law is a day of rest. The act of March 7th, 1838, sec. 5, directs that when the last day of grace is a public day of rest, the protest is to be made on the preceding day; but that act is silent with regard to the giving of notice.

It is the frequent complaint of endorsers that notices of protest are given too late. This is the first time in our jurisprudence that a complaint is made of notice being given too early. The earliest

notice of protest affords the greatest facility to the endorser to guard and protect his interests.

The English books say that notice may be given on a Sunday, public days of rest, thanksgiving, &c., but that the endorser is not bound to open the letter containing the notice, or to act on it, until the next day. Bayley on Bills, (edition, 1836,) pages 265, 266, and notes. This principle of the english law is founded in that sound reason which is the same in all countries. *Nec erit alia Romæ, alia Athenis*—on the banks of the Mississippi and on the banks of the Thames.

As the endorser has pleaded the general issue, a plea which puts the plaintiff on proof of notice of the protest, we are bound to examine whether there is legal proof in the record of the notice of protest of the second note. Of this there is no evidence except the certificate of the notary, which is liable to this objection, to wit: that it *wants the attestation of two witnesses.* See act of February 14th, 1821, sec. 1.

This question has just received the examination of this court, and its solution, in the case of the *Gas Light Bank* v. *Nuttall*, just decided, 19 La., 447; and the conclusion at which we have arrived is, that the objection is fatal. There is no other evidence of *notice* than the notary's certificate, and that is insufficient to enable the plaintiffs to recover on the second note in this suit, as against the endorser.

It is therefore ordered that the judgment of the district court be affirmed so far as it relates to the maker of the note, with costs and five per cent damages; and that it be reversed as to the endorser, William Long; and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below, it is ordered that the plaintiffs do recover of the defendant, William Long, the sum of eighteen hundred and one dollars, with ten per cent interest thereon from the 4th July, 1838, until paid, being the amount of the first note sued on; and it is further ordered that there be judgment as in case of non-suit, for the said defendant, Long, as to the second note of eighteen hundred and one dollars; the costs of the appeal to be paid by the plaintiffs and appellees.

Morse and *Roysden*, for the plaintiffs.

Bullard, propria persona, and *Tuomey*, for the appellants.

WILLIAM A. GASQUET and others v. CHARLES H. VEEDER and another.

Where judgment has been rendered for a sum exceeding, by however small an amount, that claimed in the petition, it must be reduced to the amount prayed for.

THIS was an action on a promissory note against Charles H. Veeder and Miers Fisher, by William A., and James A. Gasquet and Peter Conrey, before the District Court for the parish of Claiborne, *Campbell*, J.

MORPHY, J. This is an action upon a note of hand of $1232 56, subscribed *in solido* by defendants, to the order of plaintiffs, and bearing interest on its face at the rate of ten per cent per annum from maturity until paid. The plaintiffs admit in their petition that on the 17th of March, 1840, they received on account, $379 50, which is credited on the back of the note sued on; and they pray for judgment for the balance due, with the accruing interest. The defendants having failed to answer, a judgment by default was entered which was afterwards made final. The defendants appealed. In this court they have assigned as an error apparent on the face of the record, that the judgment appealed from is for a larger sum than that claimed in the petition. On an inspection of the transcript before us it clearly appears that the judgment is *ultra petitum*, although for a trifling amount. It allows interest at the rate of ten per cent per annum on the balance due to plaintiffs, from the 13th of February, 1840, instead of giving it from the 17th of March following, at which latter date defendants had made a partial payment on the note.

It is therefore ordered that the judgment of the inferior court be reversed, and that the plaintiffs do recover of the defendants *in solido* the sum of nine hundred and one dollars and sixty-nine cents, with ten per cent interest from the 17th of March, 1840, until paid, and costs of suit below; those of this appeal to be borne by the plaintiffs and appellees.

McGuire and *Ray*, for the plaintiffs.

Thomas, *Flint*, and *Roysden*, for defendants and appellants.

JOHN N. DONOHUE v. JOHN D. HARDING, Sheriff.

Where the amount made under a *fieri facias* has been paid by the sheriff to the plaintiff in execution, before notice of the purchase of the claim to the proceeds by a third person at a forced sale, he will not be responsible to the latter.

Notice to a sheriff by a third person, not to pay over money made under an execution to the plaintiff, will not render him liable, if given before the execution came into his hands.

THIS is a case from the District Court for the parish of Carroll, *Tenney*, J., presiding.

Bemiss, for the plaintiff and appellant.

Garrett, for the defendant.

MARTIN, J. David Melton having obtained judgment against Long, caused a *fieri facias* to issue, under which some property was seized and sold on twelve months' credit, and a twelve months' bond given therefor by Worthington, the purchaser. One Brown recovered a judgment against Melton, had the twelve months' bond seized and sold, and Govey Hood became the purchaser, who assigned or transferred it to John N. Donohue, the plaintiff in this proceeding. Execution issued against Worthington on the bond in the name of Melton, the money was collected, and by the sheriff, who is the present defendant, paid over to the attorney of Melton, the original creditor.

Donohue obtained a rule against Harding, the sheriff, to show cause why he should not pay to him the money arising from the twelve months' bond, which he had improperly paid to the attorney of Melton. The rule was dismissed, and Donohue appealed.

It is first to be observed, that Harding, the sheriff and defendant in this motion, was the successor of the sheriff who had made the sale of Worthington's twelve months' bond to Hood; further, that Donohue exhibited to Harding, the sheriff, no other evidence of his title to the proceeds of this bond, than an order from Hood directing Harding to pay over the money to Donohue.

This order was presented to the sheriff at a time when he had not in his hands any writ authorizing him to make the money out of Worthington on his bond. He does not appear to have paid any attention to the application of Donohue. After the execution came into his hands, and after he had collected and paid over the proceeds to

Melton's attorney, he received another order from Hood to the same purpose as the first, to which he does not appear to have paid more attention.

It is contended on the part of the appellant, that the appellee was bound to take notice of the proceedings of his predecessor, and thus be considered as having had notice that the title of Melton to the proceeds of the twelve months' bond had been transferred to Hood. That independently of this, he must be presumed to have had notice of this transfer, from the circumstance of the deed which his predecessor had given to Hood, having been duly recorded in the office of the clerk of the court, from which the execution had issued. That Hood's order to pay the money to Donohue ought to have put him on his guard and induced him to inquire into Hood's title, before he paid the proceeds of the bond to the attorney of Melton.

The counsel for the appellee on the contrary has contended, that a new sheriff, on entering into his office, is not bound, and has not the means to ascertain what has been done by his predecessor; that he cannot be expected to take the trouble of examining the records of the clerk's or notary's offices, to discover what deeds may have been given by his predecessor; that when the appellee received the execution, commanding him to make the money and pay it to Melton, he could not disregard his obligation to do so, and follow the directions of a person who exhibited no right of intervening and claiming the proceeds of the execution.

It appears to us the court did not err.

The appellee was not bound to attend to the first notice; for at the time he received it, he had no execution in his hands, and had no knowledge of the claim of Melton or Hood against Worthington: and the appellant did not inform him of the transfer of Hood's claim to him.

The second application from the appellant to the appellee to pay over the money to him on Hood's order, came too late, as he had already paid the money to the attorney of Melton, the plaintiff in the execution.

Judgment affirmed.

Horace Prentice v. James J. Chewning.

Where in consequence of the want of sufficient time between the day on which an appeal was allowed and that on which it was made returnable, no bond was given, or citation issued, or other steps taken to prosecute the appeal, it will not be considered such an abandonment of the right as to preclude a second appeal.

Joining in the sale and signing the sheriff's deed for property sold under a *fieri facias*, does not amount to such an acquiescence in the judgment, or voluntary execution of it, as will deprive the party of the right to appeal. It would amount at most to the waiver of a monition so far as he was concerned.

The withdrawal of a juror from sickness, or other cause, produces at once a mistrial, and his place cannot be supplied but by consent.

Where after the trial has commenced, a juror has been withdrawn, and a new one sworn by consent, either party, or the juror himself, has a right to require that the witnesses shall be examined *de novo*. It will not be sufficient that the evidence, which had been reduced to writing, be read to him.

The defendant was sued before the District Court for the parish of Carroll, as the drawer of two promissory notes. The jury having returned a verdict for the plaintiff, judgment was rendered in his favor, *Davis*, J. presiding. The defendant appealed.

Bemiss, for the appellee, moved to dismiss the appeal; and cited Code of Pr., arts. 567, 594; *Dozer* v. *Sargent*, 4 La., 41.

Copley and *Downs*, for the appellant.

Bullard, J. The appellee has moved to dismiss this appeal on two grounds: *first*, that a former appeal was taken and abandoned by the appellant, and *second*, that he has voluntarily executed the judgment appealed from.

I. It appears that an appeal was allowed by the judge of the district on the 21st of September, 1840, and made returnable on the first Monday of October. But no bond appears to have been given and no citation issued. The present appeal was allowed on the 7th of December, 1840, and a bond filed comformably to the order of the judge, and the appeal made returnable to the present term. The article 594 of the Code of Practice, upon which the appellee relies, provides that as soon as the citation of appeal is served on the appellee, the appellant cannot withdraw his appeal; and whether he obtain the rejection of the appeal by producing the record from the court below, or prosecute an execution on the judgment appealed from, on the certificate of the clerk that the record has not

been brought up, the appeal shall be considered as abandoned, and the appellant shall not be allowed to renew it.

In the present case no bond appears to have been given, no citation was issued, and no certificate is shown to have been obtained from the clerk upon which the judgment was executed. The first order of appeal seems to have been considered as a nullity in consequence of the want of time between the 21st of September and the first Monday in October, when it was made returnable. This is not, in our opinion, such an abandonment of an appeal, as will preclude a second.

II. In support of the second ground, it is shown that an execution issued on the judgment, notwithstanding the appeal, and that a tract of land belonging to the appellant was seized and sold to satisfy the judgment, and Chewning signed the sheriff's deed, which contains these words, 'said James J. Chewning joins in this sale.' The article of the Code of Practice relied on, 567, declares that 'the party against whom judgment has been rendered cannot appeal, if such judgment have been confessed by him, or if *he have acquiesced in the same by executing it voluntarily*,' &c. The sheriff's sale took place in November, previously to the appeal. But we are of opinion that the sale was still a forced one, nothing showing that the appellant consented to the issuing of the execution. Even if the judgment were to be reversed, the title of the purchaser would be valid, independently of the written consent of the appellant, expressed in the sheriff's deed. At most that consent would amount only to a waiver of a monition, so far as it concerned him. It was perhaps for his interest to make no opposition to the sale, as the land would probably sell for a higher price. But it was not in his power to prevent the execution of the judgment, when the writ was in the hands of the sheriff, as his appeal then pending was not suspensive. We cannot consider this as such an acquiescence in the judgment and voluntary execution of it, as defeats his right of appeal.

The record contains several bills of exception upon which the appellant relies. One of them brings to the notice of the court an error so radical, that we cannot avoid remanding the cause for a new trial. It appears that in the progress of the trial, one of the jurors fell sick, and that the court, contrary to the will of the defendant, sub-

stituted another juror in his place from among the bystanders; he was sworn, and the evidence already taken down was read to him, instead of commencing the trial *de novo*. We are of opinion that the moment a juror was withdrawn, there was a mistrial, and his place could not be supplied without consent. But even if both parties had consented to the swearing of the new juror, the defendant had a right to require that he should hear the witnesses testify, and the juror himself had a right to propound questions to them. 8 La., 565.

It is therefore ordered that the judgment of the District Court be reversed, and the verdict set aside; that the case be remanded for a new trial; and that the appellee pay the costs of this appeal.

ALEXANDER BURKE *v.* BLOUNT B. BREAZEALE and MICHAEL BOYCE.

The court may, *ex officio*, order a trial by jury, whenever, in its opinion, the case requires it.

An agent entitled to a commission for his services, is not disqualified as a witness for his employer. So an attorney at law, though entitled to a commission on the amount recovered, will be a competent witness for the plaintiff.

An allegation by defendant, on a motion for a new trial, that a witness testified to admissions made by him in an unsuccessful attempt to compromise, will be disregarded, unless accompanied with an affidavit that he was ignorant of the circumstance at the time of the trial.

APPEAL from the District Court for Natchitoches, *Campbell*, J.

Taylor and *Dunn*, for the plaintiff.

Boyce, appellant, *pro se*.

MARTIN, J. The plaintiff claims $2949, which he alleges is due to him by the defendants, Breazeale and Boyce, at whose request he dug a ditch of 983 rods in length, which at three dollars per rod amounts to the sum claimed. He admits he has been paid $525 by Breazeale, $280 by Boyce, and $200 by Bordelon, whose property was also benefited.

The defendants severed in their answers. Boyce admitted the contract alleged in the petition, but averred that the ditches were not

cut of the depth or width mentioned in the contract, but are so shallow and narrow, that they have failed to answer the intended object or purpose. He claims the further sum of $235, which the plaintiff owes him, and the sum acknowledged to be paid, making together $515 75, which he pleads in compensation and reconvention.

Breazeale joined inthe answer of his co-defendant, Boyce, except as to the plea of compensation and reconvention, which is peculiar to the latter. He further avers that the ditching was done for the benefit of Bordelon and others, who are jointly liable with him, if there be any liability) and that it was also done under a special contract which has been broken by the plaintiff.

There was a verdict for the plaintiff, and in accordance therewith, judgment was given against Boyce for $854 27, and against Breazeale for $845. The defendant, Boyce, appealed, after an unsuccessful motion to obtain a new trial on the following grounds:

1. That the court erred, in ordering the case to be tried before a jury, when neither party had required it, and against the express wishes of the defendants.

2. That the verdict is contrary to law and evidence.

3. That the defendants have discovered, since the trial, that Taylor, the counsel and one of the witnesses, was interested in the event of the suit, and that his testimony materially influenced the jury.

It appears to us that the new trial was properly refused:

I. The court may, *ex officio*, order a jury when in its opinion the case requires it.

II. The district court was of opinion that the verdict was supported by the law and evidence; and we are unable to say that the inferior court erred.

III. The interest of Taylor was not such as to exclude his testimony. He was entitled to a commission of ten per cent on the amount recovered, for his fee. It is settled that an agent who is to receive a commission for his services, is not disqualified from being a witness for his employer. It was further urged against the competency of this witness, that he testified to matters and admissions made by defendants in an attempt to compromise and settle with the plaintiff, which failed. The court correctly disregarded this

last allegation, because the defendants have not sworn that they were unacquainted with this circumstance at the time of the trial.

On the merits the weight of the evidence supports the verdict, and judgment of the district court. In the assessment of damages, the jury appears to have allowed the plaintiff's original claim, as stated in the petition. After deducting the $200 paid by Bordelon, they have divided the balance between the two defendants; and allowed to Boyce the sum he paid to the plaintiff, with that claimed in his answer by way of compensation and reconvention; and to the defendant, Breazeale, the sum admitted to have been paid in the plaintiff's petition, and the only one which he claims. The respective balances due by each defendant, as allowed by the judgment, seem to be correctly struck between the parties.

Judgment affirmed.

GEORGE F. BARNEY v. JOHN A. DE RUSSY, Sheriff, and others.

The assessment of damages is the peculiar province of a jury. When excessive, relief will be granted, but a strong case must be made out to justify the interference of the appellate court.

Trespassers are liable jointly, each for his *virile* portion, but not *in solido*.

A sheriff who has levied an execution against one person on the property of another, will not be protected on an allegation that he acted to the best of his knowledge in the discharge of his duty as an officer. He must take care not to seize the property of A. on a writ against B.

THIS was an action before the District Court for the parish of Natchitoches, *Campbell*, J., against John A. De Russy, sheriff of that parish, and Paul Tulane and Joseph C. Baldwin.

MARTIN, J. The plaintiff obtained a judgment against the defendants *in solido* for a trespass, committed by the seizure of his goods on a *fieri facias*, which issued on a judgment obtained by Tulane and another against a third person, and executed by one of the defendants, De Russy, as sheriff. All the defendants appealed.

The case was tried by a jury, and a close examination of the evidence has impressed our minds with the belief that the trespass was clearly proven.

The counsel for the appellants has urged that the district court erred in overruling their application for a new trial on the ground of excessive damages, and in giving judgment against them *in solido*.

The verdict is for $1000 in damages. The execution was levied on the merchandize and goods in the plaintiff's store; he was turned out, the store locked up, and the sheriff took the key. He was put to great trouble and expense in obtaining an injunction, and was kept out of the possession of his goods for a considerable length of time.

The assessment of damages is the peculiar province of a jury. It is true the party against whom they are given may seek relief in this court, if the damages be excessive, but he must make a strong case to justify our interference. This the appellants have not done.

The court, in our opinion, erred in giving judgment for damages *in solido*. Trespassers are liable jointly, to wit, each one for his *virile* part. Civ. Code, 2304; 16 La., 117.

The sheriff has appealed to this court for protection on the ground of his being without interest in the case, having honestly exercised his functions as a public officer, and done nothing but what he considered it his duty to do. This court will cheerfully extend its protection to sheriffs on all proper occasions, but they must take care not to levy an execution against A. on the goods or property of B., and if they do so, they cannot expect relief at our hands. 6 Martin, N. S., 138, 325, 582; 5 La., 39.

It is therefore ordered that the judgment of the district court be reversed, and that the plaintiff recover of Paul Tulane, J. C. Baldwin, and John A. De Russy, *each*, the sum of three hundred and thirty-three dollars, thirty-three and a third cents; the costs of the district court to be paid by the defendants, and those of the appeal to be borne by the plaintiff and appellee.

Roysden, for the plaintiff.

Boyce, for the defendants.

JAMES FENWICK BRENT v. ROMAIN DABADIE, Curator.

APPEAL from the Court of Probates of the parish of Avoyelles, *Baillio*, J. The defendant was curator of the estate of Pierre Leglise, deceased.

Cushman, *O. N. Ogden*, *Waddell*, and *Brent*, *propria persona*, for plaintiff and appellant,

D. Seghers, for appellee.

MARTIN, J. The plaintiff is appellant from a judgment rejecting his opposition to the tableau of distribution, on which he claimed to be placed as a creditor in the sum of $500, for professional services rendered to the late Pierre Leglise, in a certain suit in which he was defendant, pending in the district court.

The record shows that Winn & Spalding, who practised in partnership in the sixth district, and two others who were partners in the practice of law in the fifth district, were employed by Leglise, who executed his two notes for $500 to each partnership, as a full compensation for their services. Soon after the employment of Winn & Spalding, and before an answer was filed by either of those gentlemen, Spalding died, and Winn took the present plaintiff into partnership, and an answer was filed, which is signed by Winn & Brent, and the other two gentlemen employed. Leglise died before any further proceedings were had in the suit, except a consultation between the attorneys before filing the answer.

The plaintiff's claim was resisted on the ground that as he does not appear to have been employed by Leglise, or by any person for him, he must be considered as a volunteer, or acting as the partner of Winn. In neither case can he be entitled to a fee against the estate of Leglise, who did not contract with him, unless in conjunction with Winn, as his partner. The evidence does not show that he was associated with the other gentlemen in that case, in any other manner than as the partner of Winn.

Judgment affirmed.

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LORENZO N. CLARKE v. THOMAS P. JONES and WILLIAM GOUGH.

Where a party residing abroad comes into our courts in the prosecution of his rights, he is in contemplation of law present like other suitors residing in the state, and is subject to the same rules and obligations; and where interrogatories are propounded to him, it is the duty of his counsel to take notice of them, and, as he is under a legal obligation to answer, and it is for his convenience that a commission issues, he must take the necessary steps to comply with the law in such a manner that his answers may be used as evidence in the case. It is not for the party calling for the answers to take out a commission, or to incur the trouble and expense of attending to its execution.

When interrogatories are propounded to a party to a suit not residing in the parish, reasonable time should be allowed him to answer; and if sufficient time has not been allowed, the party wishing to use the answers as evidence, must move for a continuance, or they will be considered as waived.

Where an absent party to whom interrogatories were addressed, appears to have honestly intended to comply with what was required of him, his adversary, who has, by a technical objection, excluded the testimony which he had himself called for, will not be allowed to avail himself of such an irregularity, to have the interrogatories taken for confessed. He should be satisfied to exclude them as evidence against himself.

A retiring partner is not responsible for goods delivered after the dissolution of the firm, nor will he be bound by any acknowledgments in regard to them made by his former partner.

THIS case was tried before the District Court for the parish of Natchitoches, *Campbell*, J. On motion of the plaintiff, the suit was dismissed as to Gough; and judgment was given for the amount claimed, against Jones. The latter appealed.

Carr and *Pierson*, for the appellant, urged the reversal of the judgment, for error on the face of the record. They contended:

1. That the court having rejected the commission, under which the answers to the interrogatories propounded by the defendant, Jones, were taken, the facts stated in those interrogatories should have been taken for confessed. That when interrogatories are propounded to a party residing out of the parish, it is the duty of the latter to answer them under a commission. That if the commission is informally executed, so that it cannot be read, it is at his peril; and that the interrogatories must be taken for confessed, or further time be allowed for a new commission. That the party interrogating does all that is required of him, when he propounds

the interrogatories, and gives the opposite party an opportunity to answer them. Code of Pr., 349, 352.

2. That the judgment was rendered without evidence; and that although a defendant sued on an open account fail in his defence, the plaintiff is bound to prove his demand before he can recover.

Boyce, for the plaintiff and appellee, prayed that the judgment might be affirmed, citing *Allain & Tremoulet* v. *Truxillo*, 14 La., 297.

Morphy, J. Jones, one of the defendants, who were formerly commission merchants at Natchitoches, has appealed from a judgment decreeing him to pay a balance of $845 64, alleged to be due to the plaintiff on the sale of one hundred barrels of pork, sent to them to be sold for his account. Annexed to plaintiff's petition is an account of sales, in which this amount is acknowledged to be due, with ten per cent interest per annum from the 1st of May, 1838, and which is in the hand-writing of Gough. Jones alone answered, and pleaded the general issue. He also averred that the partnership between him and his co-defendant was dissolved, to the knowledge of plaintiff, on the 1st of January, 1838; that the sale alleged to have been made by Jones & Gough, were made by Gough alone subsequent to this date, and that he has nothing to do with and is in no way responsible for the acts of his former partner. To support this defence, interrogatories were propounded to plaintiff, and forwarded to a justice of the peace in the county of Johnston, in the state of Arkansas, where he resided. On the return of the commission, the answers to the interrogatories being unfavorable to the defendant, his counsel objected to them, and they were rejected by the judge, it appearing from the certificate of the Secretary of state of Arkansas, that the magistrate who received them was commissioned for a different county, than that in which he appears to have acted. After this, he moved the court that the facts set forth in the interrogatories be taken *pro confessis*, as not having been answered by plaintiff. This motion was overruled by the judge, on the ground that the defendant having provoked the answers of plaintiff, to be used as evidence for himself on the trial of the cause, it behoved him to use the means required by law to obtain them, and that where any irregularity existed in taking the testimony so to be used for himself, it was not competent for him to

avail himself of such irregularity, and thereby take as confessed the facts enquired about. To this opinion a bill of exceptions was taken. We think that in this case the judge decided correctly in overruling this motion, but we cannot assent to the grounds by him assumed. When a party residing abroad, thinks proper to come into our courts of justice in the prosecution of his rights, he is, in contemplation of law, present, like all other suitors residing in the state, and is subject to the same rules and obligations. If interrogatories are put to him, it is the duty of his counsel to take notice of them, and to see that they are answered according to law. The most that can be done for such absent persons, is to allow them a reasonable time to comply with this obligation, according to the distance at which they may live from the place where their answers are called for. As it is for their convenience that a commission issues, it behoves them to see that it be properly executed, in order to comply with an obligation imposed on them by law. The opinion delivered in the case of *Allain & Trimoulet* v. *Truxillo*, 14 La., 297, which is relied on by the plaintiff's counsel, does not justify the ground taken by the judge, that it is the duty of the party calling for the answers under oath of a non-resident, to take out a commission to receive them, and to attend to its execution abroad. We said in that case that reasonable time should be afforded to a party living in a different parish, to make and forward the answers asked of him; that if that time had not been allowed, it was for the party wishing to use such answers as evidence, to move for a continuance; and that by going to trial without taking the necessary legal steps to give the absent party the possibility of answering his interrogatories, he must be considered as having waived them. But we never intended to convey the idea that the interrogating party was bound to take out a commission, and be at the trouble and expense of attending to its execution. The party who is under the legal obligation of answering to interrogatories must take the necessary steps to comply with the law, and must take care to do it in such a manner that his answers can be used as evidence in the cause. But at the same time, when, as in this case, a party appears to have honestly intended to do what is asked of him, his adversary, who, by a technical objection, has excluded the testimony, which he himself had called for, should not be permit-

ted to avail himself to the extent contended for, of an irregularity which is probably a clerical error in the certificate appended to the commission. The defendant should, it seems to us, have been satisfied with excluding these answers as evidence against himself. If any unfairness had been shown on the part of the plaintiff, or if there had been great carelessness in the discharge of the duty imposed upon him, he might be considered as having wilfully neglected to give his answers in a proper form, and the interrogatories might have been taken for confessed; but under the circumstances of this case, the judge, in our opinion, correctly overruled the motion of defendant's counsel. If the latter were anxious, which is rather improbable, to procure other answers from the plaintiff, he could easily have obtained a continuance.

On the merits, we are of opinion, that the answers to the interrogatories having been excluded, the record does not furnish sufficient evidence to sustain plaintiff's demand. It is proved that Jones and Gough were in partnership only up to the 1st of January, 1838; it is not shown that plaintiff had any dealings with them, or that his goods were sent to them before that time; and from the account signed by Gough on the 1st of May, 1838, all the sales made for the plaintiff's account appear to have taken place after the 1st of January preceding. Unless the plaintiff had delivered his goods to the firm before its dissolution, Jones cannot be responsible for any part of their proceeds, nor is he bound by the acknowledgment contained in the account of sales, signed by his former partner. From the circumstances of this case, however, we are of opinion that justice requires that we should remand it for a new trial.

It is therefore ordered that the judgment of the district court be reversed, and that this case be remanded for a new trial; the plaintiff and appellee paying the costs of this appeal.

THOMAS MACKIN and others v. CHARLES N. ROWLEY.

A supplemental petition containing no new allegations, and filed for the sole purpose of propounding interrogatories, to which the defendant has neglected to answer after sufficient time, may be withdrawn, by leave of the court, after the case has been called for trial.

Where in a suit against a land-holder for his proportion of the expense of work executed by the plaintiffs, under a contract with commissioners appointed by an ordinance of the police jury, the plaintiffs rely on an assumpsit of the defendant, proof of the appointment of the commissioners will not be required.

THIS was a suit before the District Court of Concordia, *Tenney*, J., by Thomas Mackin, Edward Dunn, and Andrew Murray, for work done on the lands of the defendant, under a contract with commissioners appointed by the police jury of the parish of Concordia, the cost of which was ordered by the police jury, in the exercise of the power conferred on them by law, to be paid by the defendant.

Farrar, for the plaintiffs.

Huston, for the defendant and appellant.

MARTIN, J. The plaintiffs having excavated a canal in consequence of an ordinance of the police jury, and in pursuance of a contract with commissioners appointed by that body, instituted the present suit for the balance of the defendant's proportion of the sum to which they were entitled under their contract.

Their claim was resisted on the plea of the general issue, and an averment that the defendant never assumed the payment of said claim.

The plaintiffs, afterwards, with leave of the court, filed an amended petition, the sole object of which was to propound interrogatories. This amended petition was served on the defendant, who neglected to answer the interrogatories propounded to him. Fourteen days after this service, the case was called for trial, the plaintiffs with leave of the court withdrew their amended petition, and the defendant took his bill of exceptions to the opinion of the court granting leave. The plaintiffs had judgment, and the defendant appealed.

Our attention is first drawn to the bill of exceptions. The amended petition contained no admission. The defendant had

neglected for nearly a fortnight to answer the interrogatories, and complained of the withdrawal of the petition solely because it prevented him from availing himself of the absence of a judgment by default. Admitting that a judgment by default, might or ought to have been taken on this amended petition which contained no new allegation, that was susceptible of denial or admission, the court did no injury to the defendant in granting the leave to withdraw it. He lost thereby no other faculty, but that of answering the interrogatories. He had ample time to answer them, and his failure to do so, raises a very strong presumption that it was not his interest to respond to the interrogatories.

On the merits, the defendant urged at the trial, that there were no commissioners appointed by the police jury as alleged, and that the plaintiffs had no right to sue for this claim.

It appears to us that there was no necessity for making proof of the appointment of commissioners. The plaintiffs relied on the assumpsit of the defendant, and the partial payment he had made, followed by a promise to pay the balance in notes of Mississippi banks, or on a short delay if they would take his own note without interest, or with five per cent interest, instead of ten on which the plaintiffs insisted. It is in evidence that the defendant is owner of a large tract of land, the value of which was greatly increased by making the canal.

Judgment affirmed.

HYMEN M. HART and others *v.* WILLIAM LONG and another.

Demand of payment and presentment of the note at the place of payment indicated in the instrument itself, are indispensable to a recovery against the maker, and *a fortiori* against the endorser.

Where in an action against the endorser of a note, the plaintiff has been non-suited, in consequence of want of legal demand at the place of payment, and pending a motion for a new trial, the latter, with full knowledge of the circumstances of the demand and of the non-suit, undertakes voluntarily and absolutely to pay, he will be bound.

Where the endorsers of a note, who were partners at the time of endorsement, have been discharged by want of legal demand, a subsequent promise to pay, made by one of them after the dissolution of the firm, will not be binding on the other.

APPEAL from the District Court for the parish of Natchitoches,

Campbell, J. This was an action by Hymen M. Hart, and Abraham C. and Barnett B. Labatt against William Long and Joseph T. Robinson. There was a judgment of non-suit; a new trial; and a judgment against the defendants, *in solido*, for the amount claimed. The latter appealed.

MORPHY, J. The defendants pray for the reversal of a judgment, rendered against them as endorsers on a note of $340, on the ground that no demand was made at the place indicated for payment in the body of the instrument itself. The note was made payable at the City Bank of New Orleans at Natchitoches, and the deed of protest shows, that the notary demanded payment of the same from the drawer, and was answered that it could not be paid. It is now well settled in this State, whatever may have been the adjudications on this point elsewhere, that a demand of payment and presentment of the note at the place indicated for payment in the instrument, are indispensable to a recovery against the maker. If this be true in a suit against the maker, it is so *à fortiori* in a suit against an endorser, who can be made liable only by strict proof of a legal demand on the maker. 3 Martin, N. S., 423; 10 La., 552; 12 Id., 472; 14 Id., 181; 15 Id., 242.

The testimony of the parish judge, who made the protest, was heard below, to explain the circumstances accompanying the demand made on the drawer of this note. Even if his testimony were legal, which may well be doubted, it is entirely too vague and uncertain to be of any weight. He states that the note was not, he thinks, given to him for protest at the Bank; that he thinks, the cashier gave it to him at his office, and from the phraseology of the demand in the protest, he thinks, that the maker replied that the note need not be presented at the Bank, that it would not be paid—that this is his impression.

Such testimony adds little to the protest, which is clearly insufficient to charge the endorsers. But it appears, that pending an application for a new trial of this case below, in November last, the attorney of plaintiffs told Robinson, one of the defendants, that if the new trial was refused, he would appeal. That Robinson replied, that it would not be worth while; that Charles A. Bullard, the maker, had promised to make some arrangements, and that he would pay in January or February following; and that when this promise

was made, the attorney explained to Robinson, why the plaintiffs had been non-suited, telling him, that it was because the demand of payment had been made of the maker, and not at the Bank. It appears that when plaintiffs' attorney called again on Robinson, he then said, he had understood his first promise as being conditioned upon the promise of Bullard, that the latter had failed to make arrangements, and that the matter must take its course according to law. The attorney declares, that he understood the promise of Robinson to be unconditional. Robinson has, in our opinion, rendered himself liable by this promise. With a full knowledge of all the circumstances of the demand, and of the nonsuit, which had been entered up against the plaintiffs, he voluntarily and absolutely undertook and bound himself to pay the debt within a given time, and seemed desirous of putting a stop to all further litigation about it. The circumstance that the maker had promised to make arrangements, seems to have been mentioned by him rather as the inducement, which led him to make the promise, than as a condition on which it was to depend; and the witness declares, that the promise was by him understood to be absolute and unconditional. This promise can be binding, however, only on Robinson himself, because the evidence shows, that at the time this conversation took place, the commercial partnership, which had before existed between the defendants, was dissolved.

It is therefore ordered, that the judgment of the District Court be affirmed with costs as against Robinson, and that it be reversed as against Long, the plaintiffs and appellees paying his costs in both courts.

Boyce, for the plaintiffs.

Hertzog and *Tuomey*, for the defendants.

PETER G. OLIVER and others v. JAMES H. STEVENS, Sheriff, and another.

The purchaser of property sold under an order of seizure subject to a previous mortgage, will be responsible only for the amount of such mortgage, and any surplus he may have bid above that amount. And where such previous mortgage is revoked so far as a third person is concerned, and his claim declared to have precedence on the proceeds of the mortgaged property, the amount due from the purchaser on account of the mortgage, will be first applied to the settlement of that claim, and the balance only will belong to the holder of the mortgage.

Every one is bound, at his peril, to know the law applicable to his case; if he misapprehends it, he must take the consequences. He cannot make his own mistakes a ground to defeat the legal rights of others.

ACTION before the District Court of Catahoula, *King*, J., by Peter G. Oliver, James Woodburn, John V. Robertson, and Sarah Schilling, administratrix of John Warfield, and tutrix of his minor heirs, against James H. Stevens, sheriff of the parish of Catahoula, and Joseph H. D. Bowmar, to enjoin an execution issued on a twelve months' bond, executed by the plaintiffs in favor of Bowmar, for certain property purchased at a sale by the sheriff under an order of seizure. The injunction was dissolved with damages, and Woodburn and Schilling appealed.

Garrett, for the appellants.

McGuire, for the defendants.

MORPHY, J. The plaintiffs, as principal and sureties on a twelve months' bond, enjoined an execution issued upon the bond at the instance of the defendant Bowmar. The facts out of which this controversy grows, are as follows: On the 8th of July, 1837, Charles S. Abercrombie had a conventional mortgage recorded in the office of the parish judge of Ouachita against Robert H. Bowmar, his brother-in-law, for the sum of $10,135, with ten per cent interest per annum, from the 18th of May, 1837. Bernard Hemken and Joseph H. D. Bowmar brought suit against Robert Bowmar for debts respectively due to them. At the same term of the court, they both obtained judgments against their debtor, which were signed on the same day. Joseph H. D. Bowmar had his judgment recorded in the office of the parish judge on the 27th of March, 1838, and Hemken had his recorded on the following day. In his

suit against Robert Bowmar, Hemken had made Abercrombie a party, and had prayed for and obtained a judgment revoking and setting aside his conventional mortgage, on the ground that his claim was fictitious and simulated, and that this mortgage was executed for the purpose of defrauding the creditors of Bowmar, and of placing his property out of their reach and pursuit. This judgment was affirmed by this court on an appeal brought at the last October term. See 16 La., 367.

While these proceedings were going on between Hemken and Abercrombie, and before the rendition of the judgment in the appellate court, Joseph H. D. Bowmar took out an execution under his judgment against Robert Bowmar, seized upon the mortgaged property, and caused it to be sold subject to Abercrombie's mortgage. At this sale Peter G. Oliver bought the property for the sum of $14,135. After deducting Abercrombie's mortgage, which was the only one taking precedence of the judgment of the seizing creditor, according to the certificate of the recorder of mortgages, Oliver gave his twelve months' bond for the surplus, to wit: $1789 96, with James Woodburn, John Warfield, and John V. Robertson, as sureties, and this is the bond now sued on. Shortly after the judgment of the district court in favor of Hemken, annulling and setting aside Abercrombie's mortgage on Robert Bowmar's property, was affirmed by this tribunal, they both joined in an hypothecary action against Peter G. Oliver, as a third possessor; they prayed that the mortgaged property might be seized and sold to satisfy, first, Hemken's judgment for $3,506 62, with ten per cent interest from the 1st of January, 1837, till paid; and secondly, Abercrombie's mortgage of $10,135 08, with corresponding interest. The district court directed an order of seizure and sale to issue according to this prayer, unless within ten days after demand, Oliver should pay these two sums with interest and costs. Being thus ordered to pay a larger amount than he had agreed to give for the property, Oliver surrendered the whole of it, to satisfy the decree of the court.

It is urged on the part of the plaintiffs and appellants, that the bond sued on is invalid, in as much as the purchase was made and the bond given in error; that the only mortgage or claim, of which the purchaser had notice as standing before that of the judgment

creditor, at whose suit the property was sold, was the one in favor of Abercrombie; that no allowance was made for Hemken's claim, which was subsequently declared to take precedence of Abercrombie's mortgage; that this claim of Hemken, amounting to $3506 62, with interest from the 1st of January, 1837, when added to that of Abercrombie with the interest accruing on it, forms a sum much larger than that which was bid by Oliver, who would not have bought the property, had he known of this additional incumbrance on it. That in fact no adjudication had or could take place, the property not having brought a sum sufficient to discharge the mortgages entitled to a preference over the judgment creditor, at whose suit it was seized and offered for sale. It does not appear to us, that in this case there was any error or mis-apprehension as to the facts existing at the time of the purchase. No other mortgage than that of Abercrombie had precedence of that of Joseph H. D. Bowmar, and the bond of Oliver was given only for the surplus. But this purchaser, when sued as a third possessor, seems to have entirely mistaken the legal consequences of the judgment obtained by Hemken in his revocatory action against Abercrombie. He supposed that it had the effect of subjecting the property he had acquired, to both the mortgages of Hemken and Abercrombie for their full amount. Such appears to have been also the opinion of all the parties concerned, and even of the district judge; but it is clear that this judgment could not affect the rights or change the position of the creditor holding the mortgage coming immediately after that of Abercrombie. It could not increase the amount of mortgages having a preference over his. Its only effect was to make Abercrombie's mortgage yield to that of Hemken's, and to entitle the latter to be paid in preference to the former out of the first money made by a sale, or paid by the third possessor of the slaves mortgaged. If instead of being seized and sold in the suit of Joseph H. D. Bowmar, the property had remained in the possession of Robert Bowmar, and upon being sold to satisfy these several mortgages, it had brought more than $10,135 08, with the interest and costs, Joseph H. D. Bowmar would have been privileged upon the excess over Hemken, had the latter's claim been larger than that of Abercrombie, whose mortgage in that event would have been superseded by or merged in that of Hemken. In the case

supposed, Hemken could have received the balance of his claim only after Joseph H. D. Bowmar's mortgage was satisfied, having had his judgment recorded one day after the latter. If on the contrary, the slaves had brought only $10,135, Abercrombie would have been entitled to the balance remaining after satisfying Hemken's claim, in preference to Joseph H. D. Bowmar, because his mortgage remained in full force as to the latter, and was avoided only as to its effects on Hemken, the complaining creditor. Civ. Code, 1972.

It is not in our power to relieve the principal plaintiff in injunction from the consequences of his mis-apprehension of the law and of his own rights. He was not bound to pay as third possessor more than $12,345 04, the amount retained in his hands by reason of the special mortgage in favor of Abercrombie. He could have enjoined the executory proceedings, and tendered the above amount to the seizing creditors. Instead of doing so, he suffered the slaves to be sold, and they brought only $4310 66, an amount hardly sufficient to pay the debt of B. Hemken, with interest and costs. He and his sureties cannot any more avoid the payment of his bond, than if upon the hypothecary action of Abercrombie alone he had surrendered the property, instead of paying the debt. This case may appear a hard one as to Peter G. Oliver, the purchaser and third possessor, but in a government like ours, every one is bound, at his peril, to know the law applicable to his case; and if he mis-apprehends it, he must take the consequences. He cannot make his own mistake a ground to defeat the legal rights of others.

Judgment affirmed.

Thomas Hooper v. Henry M. Hyams, Executor.

A jury may be prayed for in a supplemental answer; but it will be in the discretion of the court to permit such answer to be filed. It will be properly rejected where the jurors summoned for the term have been discharged, and allowing a jury would delay the trial a whole term.

An affidavit for a continuance on the ground of the indisposition of the principal counsel, unaccompanied with any allegation that he was in possession of papers necessary on the trial, will be disregarded, where the circumstances of the case induce the belief that it was made for delay.

This case was tried before the District Court of Rapides, *Boyce*, J.

The plaintiff and Isaac Thomas, his security, have appealed from a judgment dissolving an injunction with damages. The defendant was testamentary executor of George Gorton, deceased.

Thomas, pro se, and *Ogden*, for the appellants.

Dunbar and *Hyams, propria persona*, for the defendant.

Martin, J. The plaintiff obtained an injunction to stay proceedings on an order of seizure and sale, on the ground that one of the slaves which he had purchased, was, at the time, afflicted with a redhibitory malady, the dropsy, of which he afterwards died. He prayed that the sale might be annulled and set aside as to that slave, or that he might have a deduction from the price he agreed to pay for the slaves he bought. The defendant denied the existence of the malady, and averred that if it did exist, it was not to his knowledge, or to that of the persons entitled to the succession. The injunction was dissolved, and the plaintiff and his surety appealed. Our attention is arrested on a bill of exceptions taken to the opinion of the court, refusing leave to the plaintiff to amend his petition by a prayer for a jury, no jury being in attendance. It does not appear to us that the court erred. In the case of *Davis' Heirs* v. *Prevost*, 6 Martin, N. S., 265, we held that a jury may be prayed for in an amended answer, but it is in the discretion of the court to permit such answer to be filed; and in the case of *Green* v. *Boudurant*, 7 Id., 230, we held, that a jury is properly refused, when the jurors summoned for the term are discharged, and the granting of one would have delayed the trial of the cause a whole term. A second bill of exceptions was taken to the opinion of the court,

refusing a continuance on the plaintiff's affidavit of the indisposition of his principal counsel, without whose aid he could not safely go to trial, his other counsel not being sufficiently informed of the facts of the case, and there not being sufficient time to give him the necessary information. The affidavit concluded with the other averments required by law in such a case. We do not think the court erred; the case had been continued several times, and once on an affidavit perfectly similar. It was not alleged that the absent counsel was in possession of papers necessary to be produced. The case appears to be a simple one from the pleadings, depending principally on a single question of fact. A close examination of the testimony, has left on us the impression that the court correctly gave judgment for the defendant.

Judgment affirmed.

BENJAMIN GRUBBS PRICE and others v. BENJAMIN GRUBBS and others, Heirs, &c.

Before the promulgation of the present Civil Code, brothers and sisters of the whole blood excluded those of the half blood from the inheritance.

THE plaintiffs, as children of one Fanny Price, deceased, presented their petition to the Court of Probates for the parish of Rapides, *Waters*, J., praying to be admitted as heirs of Benjamin Grubbs, the ancestor of the defendants, and for a partition of the estate between themselves and the defendants.

Brewer, for the plaintiffs and appellants.

O. N. Ogden, for the appellees.

MARTIN, J. The plaintiffs are appellants from a judgment which disallows their claim to any part of the estate of Benjamin Grubbs, deceased, because their mother, through whom they claim, was his half sister only. Benjamin Grubbs died before the promulgation of the present Civil Code,* previous to which bro-

* By a proclamation of the Secretary of State, under the act of 19th April, 1824, made on the 20th of May, 1825, it was declared 'that in one month from this date, the Code shall be deemed to be promulgated.'

thers and sisters of the whole blood excluded those of the half blood from the inheritance. The case therefore presents for our solution a mere question of fact. A close examination of the case and the evidence produced, has left on us the impression that the judge of the court of probates did not err in considering plaintiffs' mother as the half sister of the deceased, and, as such, excluded from his succession.

Judgment affirmed.

EUGENE BONNET *v.* AMELIA LEGRAS.

A new trial will not be granted on the ground of newly discovered evidence, where the court is not satisfied that the party could not, with proper diligence, have discovered and obtained it before the trial, and where the affidavit contains no allegation of its importance or materiality.

APPEAL from the District Court of Rapides, *Boyce*, J. The plaintiff alleges that he leased from the defendant for five years, at an annual rent of fifteen hundred dollars, a building which had been occupied by the husband of the defendant, then deceased, as a coffee house and confectionary, and which he proposed to use for the same purpose; that he was induced to pay so high a rent in consideration of the benefit to be derived from various fixtures and utensils connected with the establishment, and offered to him by the lessor as an inducement to take the premises; that since the date of the contract, the defendant has removed a large portion of the fixtures and utensils, which could not be replaced for less than four hundred dollars. He also claimed the sum of one hundred and eighty dollars as damages for the retention of the upper part of the building by the lessor, for one month after she had contracted to deliver it. The action was commenced the 11th of April, 1838, and the case was continued from term to term, till May, 1841, when a verdict and judgment were rendered.

O. N. Ogden, for the plaintiff.

Dunbar and *Hyams*, for the defendant.

BULLARD, J. This is an action to recover damages of a lessor for violation of the contract of lease. The case was submitted to a

jury who found a verdict for the plaintiff for one hundred and ninety-five dollars. The defendant made a motion for a new trial, which being overruled, and judgment rendered upon the verdict, she appealed.

It is contended by her counsel that the court erred in not allowing a new trial, upon her affidavit of newly discovered evidence.

She made oath that since the trial she had discovered that one Ralph Canada, now residing in Natchez, can prove that he was solicited by Bonnet to appraise the distillery and confectionary utensils belonging to the late Mr. Legras's estate at the time of hiring of the premises, and that Bonnet, afterwards declined taking them. That Canada acted in conjunction with George Russell, *since* deceased. That he resides in Natchez, and that the knowledge that he could prove these facts, was not possessed by her at the time of the trial, whereby it was utterly impossible to have produced the same on the trial, or to have obtained a commission to take his deposition. We are of opinion the court did not err. The action had been pending more than three years, and the affidavit does not satisfy us that, with proper diligence, the defendant could not have discovered and obtained the evidence previously to the trial, nor does its importance or materiality appear from the affidavit. Code of Practice, 560.

Upon the merits, the case was fairly put to the jury, and we see no ground for disturbing the verdict.

Judgment affirmed.

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Frederick Williams v. Neuville Gallien.

A sale of property under execution on a judgment from which no suspensive appeal has been taken, will divest the title of the owner, though the judgment be afterwards reversed.

A sale of property by the sheriff under an execution, after the judgment has been satisfied. will give no title.

Where a judgment has been rendered in favor of the plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or to be liable for the costs; and the sheriff has no right, in violation of the orders of the plaintiff or his attorney, to sell the property seized, in order to secure their payment. Such a sale will be void.

The plaintiff filed a petition in the District Court for the parish of Natchitoches, praying that a monition might be issued, and his title be confirmed to a tract of land purchased by him at a sheriff's sale under execution against the defendant; the homologation of the sale was opposed by the latter. The sale was confirmed, and the defendant ordered to pay the costs of his opposition, *Carr*, J., presiding.

Martin, J. The defendant is appellant from a judgment homologating the sale of a tract of land of his, adjudicated by the sheriff to the plaintiff. The homologation, on the monition, was resisted on the ground of gross misconduct in the sheriff, who proceeded to the sale of the property levied on, after the defendant had paid the amount of the judgment to the plaintiff in the execution, notwithstanding the repeated directions of the attorney of said plaintiff to forbear to sell the property, and ordering the execution to be returned. The defendant supported his allegation by the testimony of Sherburne, the attorney of the plaintiff in the execution. This gentleman deposed that he received from the present defendant, then also the defendant in the execution, a draft, and agreed that all proceedings on the *fieri facias* should be suspended until it could be known whether the draft would be accepted; and that afterwards on learning that the draft had been accepted, he directed the sheriff to return the execution; that the draft was a satisfaction of principal and interest of judgment, and that he considered it as settled; that the sale was made without his knowledge, and that he ordered the sheriff several times before the sale, and once upon

seeing the advertisement of sale, to return the execution, and not sell the land. The draft was given him by Gallien, then, and now defendant, one month before the sale, which was postponed several times. The costs of suit were not included in the draft. On the part of the plaintiff and appellee, it is urged that the sheriff correctly proceeded to the sale under the execution, because the judgment was not entirely satisfied, the draft not being sufficient to cover the whole judgment, as after its payment the costs remained unsatisfied; that the purchaser at the sheriff's sale cannot be affected by the neglect of the sheriff to attend to the direction of the plaintiff's attorney, whose instructions to the sheriff were not known to the defendant; and that plaintiff had no right to prevent the sale of property seized, so as to deprive the officers of the court of the means of collecting their fees. It appears to us the district court erred. It is true, that if a defendant against whom judgment be obtained does not procure a suspensive appeal, and the judgment is afterwards reversed, the purchaser of his property on a sale under execution, before the reversal of the judgment, will be maintained in his purchase; but it does not follow from thence, that the sale of a defendant's property, after he has satisfied the judgment, would avail the purchaser. The whole judgment, including the costs, is the property of the plaintiff, who we suppose to have advanced them, or who is chargeable therewith; the judgment being, that he recover his debt and costs. Code of Pr., art. 548, *et seq.* The testimony of Sherburne is uncontradicted, and leaves no doubt of his having given repeated instructions to the sheriff to forbear selling the defendant's property, even after he had seen the sheriff's advertisement for the sale. The plaintiff purchased for seventy dollars six hundred and forty acres of land, which are alleged to be worth several thousand dollars, and were appraised at fifteen thousand, giving a twelve month's bond.

It is therefore ordered that the judgment of the district court be reversed, and that the sale of the defendant's property by the sheriff to the plaintiff be set aside and annulled, and that the latter pay costs in both courts.

Pierson, for the plaintiff.

Taylor and *Dunn*, for the appellant.

JAMES WADSWORTH v. JOSEPH M. HARRIS and MATTHEW WATSON, Sheriff.

Where a petition has been addressed, by mistake, to a tribunal different from that in which it was filed, the error will be fatal. No judgment by default can be taken, nor can permission be given to amend.

In applications to the parish judge for an injunction, under the act of 1835, the petition must, in all cases, be addressed to the district court.

THE defendant, Harris, having obtained a judgment against the plaintiff, in the state of Georgia, on producing an exemplification of the record, procured from the judge of the District Court for the parish of Caddo, an order of seizure and sale. The plaintiff, in a petition addressed to 'Washington Jenkins, parish judge for the parish of Caddo,' averred that the amount for which the said order of seizure had issued, with the costs, had been paid by him to a former sheriff of that parish, but that no return had been made thereof; he prayed that an injunction might be issued prohibiting the defendants from further proceedings under the order of seizure, and that Harris might be condemned to pay him one hundred dollars for fees of counsel, and the like sum for other damages, sustained in consequence of the illegal execution of the said order of seizure and sale. The case was tried before *Carr*, J.

MARTIN, J. The defendant moved for the dissolution of the injunction, which the plaintiff had obtained, on the following grounds: *first*, the petition is addressed to the parish judge, while it ought to have been to the district court; and *secondly*, no citation was issued as the law requires. The injunction was dissolved, and the defendant had judgment against the plaintiff and his sureties, *in solido*, for ten per cent on the amount of the execution enjoined, with fifty dollars as special damages for his attorney's fee, and costs of suit. The plaintiff appealed. It appears to us that the first error assigned is fatal. In the case of *Watson et al.* v. *Pierce*, 6 Martin, N.S., 417, we held, that where a petition was addressed by mistake to a tribunal different from that in which it was filed, the error is fatal. No judgment by default can be taken, nor can permission be given to amend the petition by changing the address. The Code of Practice, art. 171, requires the petition to be addressed to a com-

petent judge. The execution in the present case appears to have been issued from the district court, on a judgment obtained in a sister state, for a sum exceeding the jurisdiction of our parish courts. It is urged that no district judge resides in the parish of Caddo, nor was any such officer in that parish, when the petition was presented to the parish judge, who in such a case is authorized by a late law to issue a writ of injunction, returnable to the district court. Acts of 1835, p. 227. It is probable, that the present was a case in which a writ of injunction might have been issued by the parish judge. Neither the non-residence nor absence of the district judge from the parish, is, however, alleged in the petition. The petition ought, in all cases like the present, to be addressed to the district court, whether a district judge reside or be accidentally in the parish or not; and on a petition so addressed, the parish judge is competent to order the writ of injunction under the act of 1835. See also our decision in the case of *Stanbrough* v. *Scott, Sheriff, &c., ante*, 43, at the present term. We think the district court erred in allowing to the defendant fifty dollars for his attorney's fee.

It is therefore ordered that the judgment of the district court be affirmed with costs, except so far as it relates to the allowance of fifty dollars for the attorney's fee; and that in this particular it be reversed, the costs of the appeal to be borne by the defendant and appellee.

Gilbert, for the plaintiff and appellant.

Sherburne, for the defendants.

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GRANVILLE P. SMITH, Administrator, v. HENRIETTA CHENEY, Administratrix.

An administrator will be entitled to the full commission of two and a half per cent on the amount of notes taken by him for property sold at the probate sale of the succession. The commission is allowed not only for the actual trouble he may have had, but for the responsibility incurred. By selling the property, attending to the execution of the instruments of sale, and obtaining solvent endorsers on the notes received, he may well be considered as having, so far, fully administered on it.

Where all the property of an estate has been retained in kind, and, after a few months' administration, delivered over to the heirs, the administrator will be entitled to a commission of two and a half per cent on the whole amount of the inventory.

The fees of counsel employed by an administrator on rendering the account of his administration, are a part of the expenses incurred, and form a correct charge against the estate; and when the account has been rendered by the administratrix of a deceased administrator, she will be entitled to claim the allowance of such fees for counsel employed by her to render the same.

APPEAL from the Probate Court for the Parish of Rapides, *Waters*, J.

MORPHY, J. The plaintiff, as the present administrator of the succession of Hampton J. Cheney, deceased, brought suit in the court below against the defendant, as administratrix of David Cheney, deceased, the former administrator of the estate of H. J. Cheney, to obtain an account of his administration. When this account was presented, two of the items charged to the estate were objected to by the plaintiff, to-wit:

1. The sum of $2,769 84, charged for the late administrator's commission on $110,793 64, at two and a half per cent.

2. The sum of $500 for counsel fees for the rendition of the account called for.

The judge below allowed a full commission on $32,380 36, which amount appeared to him to have been fully administered upon; and allowed only a half commission on $78,641 15, which sum was returned by the administratrix in notes proceeding from the probate sale of the succession of the deceased H. J. Cheney, and overruled the second objection. From this judgment, the plaintiff appealed, and the defendant has prayed in this court that it be amended so as to allow the full commission charged.

The conclusion to which the judge below has arrived has been dictated by principles of equity, but we do not believe it sanctioned by law. In the absence of any provisions in our Code on the particular case presented to us, we are of opinion that the administrator is entitled to a full commission. By selling all the property of the estate, attending to the execution of the sales, and to the taking of solvent endorsers on the notes given by the purchasers, he might well be considered as having administered on the whole estate, so far as he had progressed with its settlement. The commission is allowed not only for the actual trouble which the administrator may have had, but also for his responsibility. Had all the property of the estate been retained in kind, and after a few months' administration, delivered over to the heirs, as is sometimes the case in vacant successions, he would have been entitled to two and a half per cent on the whole amount of the inventory, and yet the responsibility and trouble would not have been so great. He has collected a sufficient amount on the notes of the sale to pay the debts of the estate, and has had the safe keeping of the balance of the others, which are drawing interest at the rate of ten per cent per annum. If no fault has been found with his management of the estate, we think that he cannot be deprived of any part of his commission.

The second objection was correctly overruled by the probate judge. The charge is admitted to be a moderate one. Article 1063 provides that the expenses incurred by the administrator for the rendering of his account, shall be at the cost of the estate. If this item could not be objected to in an account of his administration, filed by David Cheney himself, it is not perceived how it can be an illegal charge when claimed by his administratrix in rendering an account of his administration.

It is therefore ordered that the judgment of the court of probates be amended so as to allow the defendant the item of $2769 84, charged in the account under No. 78, and that the judgment be affirmed in other respects; the costs in both courts to be paid out of the estate.

Brent and *Ogden*, for the plaintiff and appellant.

Dunbar, *Hyams*, and *Elgee*, for the defendant.

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James Roberts v. Warren M. Benton.

Where the appellant fails to take the necessary steps to prosecute his appeal, he will be considered as having abandoned it, in the sense of art. 594 of the Code of Practice; and will not be allowed to renew it. *Aliter*, when the appeal is dismissed on motion of the appellee. In the latter case, it may be renewed at any time within the delay fixed by law.

Appeal by the defendant from a judgment of the District Court for the parish of Carroll, *Davis*, J., in favor of the plaintiff.

Selby, for the plaintiff, moved to dismiss the appeal, and cited Code of Pr., 594. *Dozer* v. *Sargent*, 4 La., 41.

Copley, for the defendant.

Morphy, J. A motion to dismiss this appeal has been made, which, in our opinion, must prevail. The ground assumed is that a previous appeal was taken, which the appellant neglected to prosecute. At the last term of this court, the appellant moved for an extension of time to bring up his record, but the reason given in support of this motion appearing unsatisfactory, it was refused. When a party fails to take the necessary steps to prosecute his appeal, he will be considered as having abandoned it in the sense and meaning of article 594 of the Code of Practice; and will not be allowed to renew it. It is different when, on a motion of the appellee, an appeal is dismissed; it may then at any time be renewed within the delay fixed by law.

Appeal dismissed.

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James Roberts v. Warren M. Benton.

Where the certificate of the clerk shows that parol testimony, taken on the trial, but not reduced to writing, is not to be found in the record, and there is no statement of facts, the appeal must be dismissed. The appellant cannot be relieved by a *certiorari*, as it appears from the certificate of the clerk that he cannot send up the evidence.

Appeal from the District Court for the parish of Carroll, *Tenney*, J.

Selby, for the plaintiff, moved to dismiss the appeal.

Copley, for the appellant.

GARLAND, J. The defendant is appellant from a judgment rendered against him on a promissory note. The plaintiff moves to dismiss the appeal, because the certificate of the clerk shows that the case cannot be examined on the merits. The certificate is, that it is a 'correct transcript and true copy of all the proceedings had, and papers and documents filed in the above entitled suit, as well as of all the evidence adduced by the parties, *except parol testimony, which was not reduced to writing on the trial of the above recited cause, &c.*' From this statement it is evident that the case cannot be examined on its merits, and it is not in our power to aid the defendant by a *certiorari*, as the clerk could not from his certificate send us the evidence. The defendant does not appear to have called on the plaintiff for a statement of facts, or on the judge to make one, after the plaintiff refused. At the time of the trial he does not seem to have manifested any intention of taking an appeal, and did not require the evidence to be taken in writing. The appellant has taken no other step to bring his case before us, than to take an appeal. We can therefore do no more or less than dismiss it with costs. 3 La., 454. 17 Id. 197. 18 Id., 437.

Appeal dismissed.

WARREN M. BENTON *v.* ABNER C. and JAMES ROBERTS.

One joint and several obligor cannot rescind an agreement made by both with their common creditor, and which operated a discharge, so as to compel his co-obligor, who does not consent to the rescission, to remain bound. The obligation once extinguished, can only be revived against those who consent to it.

A receipt to one of two obligors *in solido*, purporting to be for his part, severs the obligation, and extinguishes it as to him who has paid.

A party may be bound by what is contained in an act between third persons, where it is proved that he had notice of it; and, as parol testimony is necessary and admissible to prove such notice, whatever took place at the time of notice, may, by the same kind of evidence, be proved as part of the *res gestæ*.

THIS case is brought up from the District Court for the parish of Carroll. It was tried as to James Roberts before *Davis*, J., and as to the other defendant, before *Tenney*, J.; but the judgments against both defendants were delivered by the latter.

GARLAND, J. This action was commenced by the endorsee of three promissory notes, for the sum of $4380 each, drawn by the defendants to the order of Theodore D. Elliott, and endorsed by him, payable March 1, 1838, 1839, and 1840. The last note, on which there is a credit of $675, is said to have been mislaid. An attachment was taken out against one of the defendants who is a non-resident.

In the petition it is alleged that the defendants are jointly indebted; but two of the notes are annexed to the petition and asked to be taken as a part thereof, and they are joint and several obligations; and the prayer is for judgment for the amount due, as *appears by the notes* referred to.

The two notes produced, payable on the 1st of March, 1838 and 1839, were endorsed, without recourse, on the 24th of March, 1838.

James Roberts for answer admits, that he signed the notes, but says that they have all been paid, as will appear by an authentic act annexed to his answer, executed by Elliott on the 26th of March, 1838. He says the notes were, after their discharge, obtained surreptitiously by plaintiff, and without consideration. That so far from his being indebted to plaintiff, the latter is largely indebted to him, as he has repeatedly admitted. He alleges fraud, prays that the demand of plaintiff be rejected, and that the notes be cancelled and delivered to him.

To this answer is annexed an authentic act signed by Elliott, the payee of the notes, dated on the 26th of March, 1838, in which he acknowledges that all the notes are paid in full, and releases the mortgage given to secure them; and the notary, in the act, says that the notes 'were produced to me, said notary, by the said Abner C. Roberts and James Roberts, here, in presence of the appearer;' and he further says, that the notes and mortgage were executed before him on the day they are dated, and that they have his paraph *Ne varietur*, on their face. The recorder of mortgages is specially authorized to erase the mortgage, and make it null and void.

In addition to the positive release contained in this act, the notary was examined as a witness on the trial, and says that the plaintiff was aware of the contents of the act of release, and that he was interested in having the release made, as he had purchased of

James Roberts half of the land mortgaged; and this statement is verified by an authentic act of sale from James Roberts to Benton, passed the next day after this release was executed. He also testifies to other matters, which will be hereafter noticed.

How any court could permit a transaction so simple as was presented by the pleadings in this case, to take the course that was pursued, and become as confused as it was made, is inconceivable. The parties have been allowed to enter into various other transactions, documents of various kinds have been received in evidence, as well as parol testimony, and the record is studded with bills of exceptions.

The defendants severed in their answers, though they rely upon the same grounds; and A. C. Roberts annexes to his answer the same release presented by his co-defendant. The cause as to James Roberts was tried at one term of the court by one judge, and as to Abner C. Roberts, at a subsequent term, by another; both permitted great latitude in the trial, and the record is swollen to a volume. There were two judgments rendered, condemning each defendant separately to pay the plaintiff $8760, with five per cent interest from the 11th of February, 1840, until paid; from which both have appealed.

To attempt an investigation of all the ordinary and extraordinary points raised in the case, and a correction of the decisions made on them, would be a waste of time, and not promote the justice of the case, which is evidently one in which the parties do not understand their own rights, or are endeavoring, in the confusion they have created, to cheat each other.

From the mass of documents and parol testimony we have selected such, as we think will elucidate the matter, and enable us to give a correct judgment in the case.

Elliott, the payee of the notes, in 1836, sold the defendants a tract of land for $21,900, and the three notes sued on were, with others, and a mortgage, given to secure the price. Sometime after this purchase by defendants, they sold a portion of the same land to Henry and Wesley Roberts for $22,409 90, one fifth in cash, and four notes for $4480 18 each, were given, payable on the 1st of January, 1838, 1839, 1840, 1841, and a mortgage was retained to secure their payment. When the note from defendants to Elliott

became due, in March, 1838, he was about to proceed on his mortgage, to enforce the payment of it, and of the two others falling due in March, 1839 and 1840. To prevent this, the plaintiff gave Elliott thirteen slaves for these three notes, which were transferred to him, and as all parties wished Elliott's mortgage raised, it was done by the act annexed to the answers, the plaintiff being present and assenting, although he did not sign the release. The defendants, in payment of the three notes set out in the petition, then gave plaintiff three of the notes of Henry and Wesley Roberts, amounting to $13,440 54, each of them payable two months in advance of their own notes, but they did not endorse them. On these notes and the mortgage of H. and W. Roberts to J. and A. C. Roberts, Abner C. Roberts, in his own right, and James Roberts, for the use and benefit of Benton, the plaintiff, obtained an order of seizure and sale of the land, and A. C. Roberts and Benton became the purchasers of it, for two thirds of its appraisement, to wit: for $13,000; and the sheriff made them a deed for it, and put them in possession. Of this sale James Roberts has never complained, so far as the record informs us, and all parties appear to have well understood, that when the plaintiff took the three notes of Henry and Wesley Roberts, that the notes of defendants were discharged, and they would have been entirely, but that Abner C. Roberts insisted on becoming a partner with Benton in the purchase of the land, and so far as he was concerned, the understanding or agreement was revoked; but it does not appear that James Roberts ever consented to its being annulled, and it is certain, Benton did not so consider it, for he proceeded, in the name of James Roberts, for his (Benton's) use, had the land sold, and realized $6500, which was more than the moiety of the three notes sued on.

It is not denied that Benton realized the sum of $6500 by the purchase of the land of H. and W. Roberts, but it is said, he ought not to give any credit for it, as the defendants did not endorse the notes when they gave them to him, which was to have been done. As to James Roberts, that can make no difference, as Benton used his name for his own benefit, and realized his half of the debt as effectually as if the notes had been endorsed. As to Abner C. Roberts, he was dispensed from his agreement to endorse the notes, by the subsequent arrangement between him and the plaintiff, and

their joint purchase of the land, which they afterwards held as equal partners.

It is further contended, that although James Roberts did pay the $6500 on these notes, yet as he is an obligor *in solido* with Abner C. Roberts, he is still bound for the whole amount of the notes sued on, and the plaintiff is entitled to a judgment against him, together with A. C. Roberts, for the balance of the debt. Had a payment of that sum been made on the notes by James Roberts, without any stipulation that he was to be discharged, there is no question the position assumed by the plaintiff would be correct; but when the notes of Henry and Wesley Roberts were delivered to him, the understanding was, if they were paid, that the defendants should be discharged from their obligations; and had the agreement been carried into execution, as at first arranged, the notes sued on would have been extinguished by payment. The only question remaining is, whether one joint and several obligor, by rescinding an agreement made by both with the creditor, which operates a discharge, can compel his co-obligor, who does not assent to the rescission, to remain bound with him. We think he cannot. The obligation once extinguished, can be revived only against those who assent to it. There is no evidence that James Roberts ever gave that assent.

This court have held, that a receipt given to one of two obligors *in solido*, purporting to be for his part, severs the solidarity of the obligation, and extinguishes it as to him who has paid. 4 Martin, N. S., 192. Such, we think, is the effect of the arrangements and contracts made by the plaintiff with the defendants; he must therefore look to Abner C. Roberts alone for his half of the notes sued on.

It has been strongly insisted on by the counsel for the defendants, that no parol testimony should have been admitted on the part of the plaintiff, to explain or contradict the release from Elliott to the defendants; and the article 2256 of the Code is relied on to sustain the objection. That article generally applies to those who appear to be parties or privies on the face of the act. A party may also be bound by what is contained in an act between third persons, if it be established that he had notice of it; yet as parol evidence is necessary and admissible to prove the notice, it follows, that by the

same kind of evidence, all that took place at the time of notice may be proved as part of the *res gestæ*. 1 Starkie, 57. 4 Martin, N. S., 13. 8 Id., 383, 405, 672. The law is very watchful of the stipulations of parties to a contract, in their application to third persons. The rule of *res inter alios acta* is to be regarded as a limitation and restraint upon the natural effect of collateral evidence, and must be co-extensive with the principle of its reception, and may be considered as founded on the same principles of natural reason and justice, which warrant the admission of indirect testimony. 1 Starkie, 59.

It having become necessary in this case, to show by parol evidence the connection and knowledge of the plaintiff with the notarial act between Elliott and the defendants, it was competent for him to show by the same testimony, upon what conditions and for what purposes he was to be bound, and to show a violation of the stipulations agreed on. Had Abner C. Roberts, in good faith, endorsed to plaintiff the notes of H. and W. Roberts, or had he permitted his name to be used, as James Roberts did, for the use and benefit of plaintiff, in suing on those notes, and allowed him to purchase the whole of the land mortgaged to secure those notes, there is no doubt, he (Abner) would have been discharged from the payment of the notes, as well as his co-defendant. But as he has acted otherwise, and the plaintiff has consented to it, they must abide by their own contracts, but cannot hold James Roberts bound, who did not assent, so far as we are informed, to Abner's becoming interested in the purchase of the land.

The judgments of the District Court are therefore reversed, and this court proceeding to give such judgment, as in their opinion should have been given in the court below, does further order and decree, that there be judgment in favor of James Roberts, discharging him from all liability on the notes sued on, without prejudice to his right to set up in payment or compensation against the last note mentioned in the petition, whatever shall remain of the sum of six thousand five hundred dollars, after extinguishing his (James Roberts') half of the two notes now sued on, with costs against the plaintiff in both courts: And it is further ordered and decreed, that the plaintiff, Warren M. Benton, do recover of and have judgment against the defendant, Abner C. Roberts, for the sum of four thou-

sand three hundred and eighty dollars, with interest at the rate of five per centum per annum on one half of said sum, from the first day of March, in the year 1838, until paid; and interest at the same rate on the other half of said sum, from the first day of March, in the year 1839, until paid, with costs in the district court; those of this appeal to be paid by the plaintiff and appellee. It is further ordered, that the judgment of nonsuit on the lost note be affirmed.

Copley, for the plaintiff.

Browder and *Selby*, for the defendants and appellants.

UNION BANK OF LOUISIANA *v.* JAMES BROWN and another.

Notice of protest to the endorser of a promissory note, when sent by mail, must be directed to the post office nearest to his residence, where it is not shown that he was in the habit of receiving his letters from another office, or he will be discharged.

THIS was an action before the District Court of Rapides, *Boyce*, J., by the holder against Brown, the payee, and John A. Texada, endorser of a promissory note. No citation appears to have been served on Brown. It was proved on the trial that the post office at Cotile was twelve, and that at Alexandria fifteen miles from the residence of Texada.

MARTIN, J. The defendant, Texada, is appellant from a judgment against him as endorser, and prays the reversal of the judgment on the ground of the absence of evidence of legal notice. The letter inclosing the notice was directed to him at Alexandria, which is not the post office nearest to his place of residence; there being another post office at Cotile, in the same parish, shown to be nearer to his residence. An attempt has been made to show that the appellant was in the habit of receiving his letters and papers at the Alexandria post office, at the time the notice of the protest was sent to him; but this attempt has been unsuccessful.

It is therefore ordered that the judgment of the district court be reversed, and that ours be for the defendant, with costs in both courts.

H. Taylor, for the plaintiff.

Brant and *O. N. Ogden*, for the appellant.

HELOISE SEGREST, Administratrix, v. GOVY HOOD.

Where the plaintiff sues as administratrix, and her capacity is denied, she must prove it, or be non-suited.

THE plaintiff, as administratrix of Bardee Segrest, deceased, instituted a suit before the District Court for the parish of Carroll, to annul a sale made by the deceased to the defendant, on the ground of fraud. Hood pleaded *first*, prescription; *second*, that the plaintiff had no right as administratrix to maintain the action; *third*, a denial that she was the administratrix of the said Bardee Segrest; and *fourth*, a general denial; and his answer concluded with a prayer 'that the demand of the plaintiff be rejected, that her suit be dismissed, that he have judgment against her on the merits, and for general relief.' No evidence appears to have been introduced; and a judgment of non-suit was rendered by *Tenney*, J.

Copley, for the plaintiff.

Selby, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment of non-suit. She sues as administratrix of her deceased husband. Her capacity was denied, and she failed to make any proof of it. She cannot complain of a judgment which is the legal consequence of her own negligence, or that of her counsel.

Judgment affirmed.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Where a dilatory exception has been filed before a judgment by default, it must be noticed, though followed on the same sheet of paper by an answer to the merits. The last clause of the twenty-third section of the act of 20th March, 1839, only prevents the filing of such exceptions after a judgment by default.

GARLAND, J. The plaintiff's counsel applies for a re-hearing on the ground that he was not bound to notice the exception to the want of capacity of the plaintiff to sue, because with it was filed a peremptory exception, and an answer to the merits; and he insists on

a literal application of the twenty-third section of the act of 1839.

On the first day of the term to which the process in this case was returnable, the defendant appeared, and on the same page of a sheet of paper, he pleaded, 1st. Prescription; 2d. The want of the capacity of the plaintiff to sue; 3d. A general denial. On the trial, the counsel for plaintiff did not prove that she was administratrix, and on that and other grounds, a non-suit was entered. He strenuously urges he was not bound to notice the exception. We think he was. It was filed before a judgment by default was taken, and no issue was joined previous to the exception being presented. We think the latter clause of the section only prevents dilatory exceptions being filed, after a judgment by default; but if filed previously, we think they ought to be noticed, although followed by an answer to the merits.

Re-hearing refused.

Govy Hood v. Heloise Segrest.

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The character of the action, whether petitory or possessory, is not determined by the allegations in the petition alone, but by the prayer of the petition and the allegations.

Where the petition alleges that plaintiff had both the property and the possession of certain slaves, and concludes with a prayer that the defendant be condemned to deliver up *the possession*, the prayer makes the action a possessory one; had the latter been for *the recovery* of the slaves, the action would have been a petitory one. So where the petition avers that the plaintiff owned, and had possessed as owner certain slaves, and prays that he may have *judgment for them*, the action will be a petitory one.

Appeal from the District Court for the parish of Carroll, *Tenney*, J. The evidence on the trial of this case established that the slaves sued for were taken from the plantation of the plaintiff, on the night of the 18th of July, 1840, and were subsequently found in possession of the defendant. It was also proved that the plaintiff had been in possession of them for upwards of twelve months preceding. No evidence was offered to prove plaintiff's title to them. The verdict found, 'for the plaintiff, for the possession of the negroes sued for'; and the judgment was, 'that he recover from the defendant the possession' of them.

MARTIN, J. In this case the plaintiff alleges that 'he is the owner and has possessed *as owner*, for more than a year,' four slaves, to wit: Lucy and her three children, which are in the possession of the defendant, who refuses to deliver them up. He prays that they be sequestered, and that he have judgment *for said slaves* against the defendant, and for $200 damages; and that they be delivered to him.

The defendant pleaded the general issue, and set up other matters of defence.

The case was tried by a jury, who returned a 'verdict for the plaintiff, for the possession of the slaves sued for.' From the judgment rendered on this verdict, the defendant appealed.

The plaintiff begins by stating that he is owner, and has been in the possession of the slaves sued for. After such an allegation, the conclusion of the petition might well support either a petitory or a possessory action—a petitory action, if the plaintiff demanded the title and restoration of the slaves; a possessory one, if he demanded the possession only. It is not the allegations, but the prayer of the petition and the allegations, that give character to the action. In the case of *Kemper's Heirs* v. *Hulick*, 16 La., 44, the plaintiffs, in the allegations of their petition say, they had the *property and possession* of the slave sued for, and pray that the defendant *deliver up the possession* of said slave. It was the prayer that made the action a possessory one; had he prayed for the *recovery* of the slave, the action would have been a petitory one. In the present case the plaintiff does not pray that he may recover the *possession* of the slaves, but that *he have judgment* for them. This gave to his action the character of a petitory one.

The evidence does not establish title in the plaintiff to support a petitory action, and the court in our opinion erred, in considering the present suit as a possessory action.

It is therefore ordered that the judgment of the district court be reversed, the verdict set aside, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of the appeal.

Selby, for the plaintiff.

Copley, for the defendant and appellant.

HENRY M. BRY, Under-tutor, v. JOHN DOWELL, Executor.

It is the duty of an executor, when rendering his accounts, to disclose the name of the heir to the succession, and require that he be cited through his tutor or under-tutor.

On an opposition by the under-tutor of a minor heir to the homologation of the account of an executor, who was also tutor to the minor, the latter cannot object to proof of his tutorship, when offered by the opponent, on the ground that such tutorship was not alleged in the opposition. So soon as his right to oppose the account was contested, the under tutor was bound to show that there existed such an opposition of interest between the minor and his tutor, as made it his duty to appear on behalf of the former; and this could not be done without showing that the executor was himself the tutor of the minor, to whom he was rendering an account.

Where an under-tutor, in behalf of a minor, opposes the homologation of the accounts of an executor, it will be presumed that the estate has been accepted according to law, otherwise the minor would be without any interest in the matter.

The decree of a court of probate homologating the accounts of a tutor, rendered contradictorily with the under-tutor, is not conclusive against the minor, who has a certain time after majority within which to examine and contest them; and the court can in no way discharge the tutor, while the law makes him responsible to his pupil.

An executor is entitled to his discharge at the expiration of one year; his accounts cannot remain open, and his responsibility be continued for a number of years; and when they have been once settled by the court of probates, contradictorily with the heirs of age, or minors represented by their tutors or under-tutors, the decree will be as final and binding on such heirs as any judgment in an ordinary suit, to which they may have been parties.

Where an executor is also tutor to the minor heir, his accountability to him as executor, should be finally determined before he enters upon his administration as tutor, which is to last until the majority of his ward.

APPEAL from the Court of Probates for the parish of Ouachita, *Leamy*, J.

MORPHY, J. Nancy Kirkpatrick, by her last will and testament, appointed the defendant her executor, and at the same time, tutor to her only son, James Strong, a minor. He accepted these trusts, and qualified in both capacities. After administering on the estate, he filed his account as executor, praying for its homologation, for his discharge as executor, and for a judgment against the estate for a balance of $2508 82. Plaintiff, acting as under-tutor to the minor, under an appointment of the court of probates, opposed this account on a

variety of grounds, several of which were sustained by the judge below, who gave a judgment against the executor for $3126 05½, due the estate, with five per cent interest from the date of its rendition. The executor appealed.

On the trial, several bills of exceptions were taken, which we will proceed to notice. The defendant having excepted to plaintiff's right to oppose his account, evidence was offered by the latter to prove that defendant was the tutor of the minor heirs of the deceased, to whom he was rendering an account of his administration as executor; but this evidence was objected to, on the ground that plaintiff's opposition did not allege this fact. The objection was properly overruled. It came with singular bad grace from the defendant, whose duty it was, when rendering his account, to have disclosed the name of the heir of the succession, and to have required him to be cited through his under-tutor. It was not necessary for plaintiff to allege the tutorship of the defendant, in his opposition. As soon as his right to oppose the account was contended, he was bound to show that there existed such an opposition of interest between the minor and his tutor, as made it his duty, as under-tutor, to appear on behalf of the former; and this he could not do without showing that the executor was himself the tutor of the minor, to whom he was rendering this account. It has been contended that an under-tutor is without authority to oppose, in the name of a minor heir, the accounts of an executor, because such a step might amount to an acceptance of the estate, which cannot take place without the advice and consent of a family meeting, and that any judgment which might be rendered would not be conclusive and binding on the minor, who could, on becoming of age, open and contest the accounts. When an under-tutor deems it his duty to contest an executor's account on behalf of a minor, we are bound to suppose the estate has been accepted according to law, otherwise the minor would be without any interest in the matter. In this case, the record shows a large amount of property on hand, independent of the monies the executor has to account for. As to the effect of the decree in such a case, the defendant has treated it as a final one by bringing up this appeal, and such we consider it to be. We have said in relation to accounts rendered by tutors, contradictorily with the under-tutor, that the decree of a

court of probates homologating them, is not conclusive on the minor, who, after his majority, has a certain delay to examine and contest them; and that the court can, in no case, discharge the tutor, while the law makes him responsible to his pupil. 10 La., 329. Civ. Code, 356. But it is quite different with an executor, who, at the expiration of one year, is entitled to his discharge. His accounts cannot remain open, and his responsibility suspended for a number of years. When his accounts are settled and passed upon by the court of probates, contradictorily with the heirs of age, or minors, represented by their tutors or under-tutors, as the case may be, the decree is as final and binding on such heirs as any judgment in an ordinary suit, to which they may have been parties. Civ. Code, 301. 2 La., 148. 7 Id., 389.

The plaintiff next offered evidence to show that, as alleged in his opposition, there were nine bales of cotton of the crop of 1839, the proceeds of which had not been accounted for. The defendant objected to any evidence being given in relation to any item not included in his account, because he had alleged that he had accounted for all the funds that had come into his hands, and because it was his intention, as soon as he should be released as executor, to administer the estate as tutor of the minor, and to account in that capacity, for all other sums that might come into his hands after the rendition of this account. The court, in our opinion, properly overruled this objection. The defendant received this cotton as executor, it was his duty to sell it, and to account for its proceeds in this settlement; his accountability to the minor heir, as executor, should be finally determined before he enters upon his administration as tutor, which is to last until the majority of his ward. It would be difficult for the latter, after a number of years, to procure evidence to establish his just claims against the defendant as executor, supposing that he could at all exercise them, after the final judgment and discharge prayed for in this case.

Another bill of exceptions was taken to the opinion of the judge below, who heard witnesses, offered by the plaintiff, to prove that the executor had employed the hands belonging to the estate in clearing lands of his own, and thereby to charge him with the value of the services rendered to himself individually. We see no error in this. The executor was bound to make these slaves labor

for the benefit of the estate, or to hire their services, if not wanted on the plantation; instead of doing so, he has employed them for his individual advantage, and is bound to account for their hire, which is so much money converted to his own use. This case exhibits strong evidence of the wisdom of that provision of our laws which has provided for minors a second protector, when there arises a conflict of interest between them and the one to whom they are entrusted by law, or the will of their deceased parents.

We have carefully examined the numerous items of the account before us, and the evidence in support of them. The judge has rejected many charges and reduced others, and we have not found, in his various decisions in relation to them, any error which requires our interference; but in summing up the charges allowed, he has committed two errors, to the prejudice of the defendant, amounting together to $556 80, which must be corrected.

It is therefore ordered that the judgment of the court of probates be so amended as to decree against the executor the sum of $2569 25½ cents, instead of $3126 05½, with interest and costs below, those of the appeal to be borne by the estate.

Garrett, for the plaintiff.

McGuire and *Ray*, for the defendant and appellee.

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ATHANASE RACHAL, Tutor, and another v. FELICE AIMÉE RACHAL and husband.

Courts of ordinary jurisdiction, before which an action of revendication is brought, must of necessity pronounce on the validity of a will, under which the property sued for is held, either when the plaintiff attacks it, or the defendant sets it up as his title.

The proceedings in a court of probates for the settlement of an estate, such as the probate of a will, and the order for its execution, cannot be considered as a judgment binding on third persons not parties thereto.

Substitutions in favor of the grand children of the testator, or of the children of his brothers or sisters, are prohibited by the Code of this state.

Substitutions are prohibited by the Code, even when the provisions of the will do not tend to alter the course of descents; and whether conditional or unconditional.

The distinction between a disposition by which the usufruct is given to one, and the naked property to another, and a substitution, is that by the former the naked property vests immediately on the death of the testator, and must therefore be to some one *in esse*, capable at the time of receiving, and clearly designated by the will; while those who are to take under a substitution, may be unknown to the testator, or not in existence at the time of making the will.

A bequest of certain property, with a provision that the legatee shall not alienate any part under any pretext, and that in the event of her dying before her husband, it shall pass to her children, contemplates the children in existence at the time of her death, and bestows on them no rights whatever until that event, and will be considered a substitution, and void as such.

ATHANASE RACHAL, tutor of Olivier Rachal, and Melisse Anty, tutor of Sylvere Levasseur, obtained a judgment against the defendants before the District Court for the parish of Natchitoches, *Campbell*, J., from which the latter appealed. The opinion of the court contains an accurate statement of the facts of the case, and of the questions of law which arose on the trial.

J. Taylor, for the plaintiffs. The judgment of the District Court should be affirmed. The suit is for real property, and the district court alone has original jurisdiction. He cited, 10 Martin, 1. 7 Martin, N. S., 470. 2 La., 26. 11 Ib., 384, 394. 12 Ib., 214, 394. 17 Ib., 4. The will created a substitution, and was consequently void, and in support of this position, he referred to Civ. Code, 1507. 4 Martin, N. S., 45 *et seq.* 4 La., 505. 6 Ib., 235, 240. 13 Ib., 1. Toullier, Brussels ed. 1837, Nos. 36, 37, 42.

Roysden, for the defendants and appellants, urged that the judgment should be reversed: 1. Because no judgment of the court of probates homologating the proceedings of the family meeting convoked on the petition of Melisse Anty and authorizing him to sue, was produced, the judgment of the court as well as the advice of the family meeting being necessary. 2. Because the district court had no jurisdiction. 3. Because the judgment of the court of probates ordering the execution of the will was unreversed, no appeal having ever been taken from it, 5 La., 386, 395; and because that court had exclusive jurisdiction. Code of Pract., 608, 924. 8 Martin, N. S., 115, 520. 1 La., 19. 2 Ib.. 15. 6 Ib., 656. 4. Because the court erred in declaring that the will created a substitution. He contended that unless a will can be interpreted in no other manner, it shall not be said to create a substitution, 5 Martin, N. S., 304, 305. 7 Ib., 417. 4 La., 504; and that no substitution is created unless an attempt be made to divert the property from the ordinary course of descents, which was not the case in the present instance. Civ. Code, 1509. 6 La. 246. 12 Ib., 483–5.

Morphy, J. The plaintiffs, as the legal heirs and representatives of a brother and sister of the late Pedro Cyriac Levasseur, claim two thirds of the property left by their uncle, the whole of which is in the possession of the defendant, Felice Aimée Levasseur, another sister of the deceased, married to Emanuel Hilaire Rachal. They allege that the defendant, Felice, sets up title to and detains all the property by virtue of an olographic will which institutes her universal legatee, but which they aver is null and void as containing a substitution or *fidei commissum*. The defendant excepted to the jurisdiction of the district court, and denied that the will contained a substitution within the sense and meaning of the Civil Code. There was judgment below in favor of the plaintiffs, from which the defendants appealed.

We cannot consider the question of jurisdiction as an open one. The doctrine is now well settled that in a suit for property, whether the plaintiff attacks the will under which it is held, or the defendant sets it up as his title to the property claimed, the courts of ordinary jurisdiction, before whom the principal matter, to wit: the action of revendication is brought, must of necessity pronounce on the validity of the will which is thus drawn in question. The proceed-

ings had in the court of probates for the settlement of the estate, such as the probate of the will, and the order given for its execution, cannot have the effect contended for by the appellant; they cannot be considered as a judgment binding on the plaintiffs, who were not parties to them. 10 Martin, 1. 7 Martin, N. S., 470. 2 La., 26. 11 Id., 385 and 394. 12 Id., 214.

The only enquiry then in the present case is, whether the will of the late Pedro Cyriac Levasseur contains a substitution reprobated by our laws. This must depend on the terms of the will. After instituting the defendant for his universal heir, the testator says, '*en donnant et léguant à ma sœur Felice Aimée Levasseur, les biens qui m'appartiendront au jour de mon décès, je veux et ma volonté est positive qu'elle ne puisse les aliener d'aucune manière et sous quelque prétexte que ce soit; que si elle décède avant son mari, les dits biens passeront à ses enfans, tels qu'elle les aura reçus de moi, voulant que celui ou ceux qui seront tuteurs des dits enfans qui n'auraient pas atteint l'age de majorité, donnent bonne et valable caution pendant le tems qu'ils gereront ce qui appertiendra aux dits enfans mineurs.*' The Civil Code, art. 1507, provides that 'substitutions and *fidei commissa* are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee.'

It is contended that this will contains no substitution; that the property is not given to be preserved and transmitted to persons different from those who would be called by law to inherit from the instituted person, which is the thing forbidden by law; and moreover that the disposition which is attacked must be considered as coming under art. 1509, which permits the naked property to be given to one individual and the usufruct to another.

The clause under consideration would be valid under the Code Napoleon, the provisions of which are less rigorous than ours on the subject of substitution. It contains an exception authorizing substitutions in favor of the grand-children of a testator, or the children of his brothers and sisters. C. N. arts. 1048 and 1049. It is well known that most of the provisions of the new, as well as of the old Code, were borrowed from the Code Napoleon, and the

presumption is, that the framers of the Code of this state would have expressly retained the exception, if such had been their intention. Instead of doing so, they have made the prohibition a general one, and we cannot make a distinction which is not to be found in the law. It is true that this provision of the will does not tend to alter the general order of descents, which is believed to be one of the grounds of the prohibition, but it is liable to another evil or inconvenience no less great, which is that it ties up property for a length of time in the hands of individuals, and places it out of the reach of commerce. In making the prohibition general as it is, the law-giver may have been governed by the opinion that a testator should not be permitted to control or regulate the transmission of his property beyond one life. From the terms of the will, the substitution appears to be subject to the condition that if the instituted heir shall die before her husband, the children shall take all the property such as their mother received it from him, and an express prohibition is imposed on her to sell any part of it under any pretence whatsoever. From this it might be inferred that if she survived her husband, she would be under no obligation to preserve for or return to her children the entire property; but admitting this substitution to be conditional, it is nevertheless embraced in the provision of our laws prohibiting substitutions; it does not distinguish between such as are made with conditions, and those that are unconditional; its disposition is general, and must be obeyed. Civ. Code 1507. 4 La. 505. 6 Id. 235. 4 Martin N. S. 45.

As to the position that in this case the usufruct of the estate was given to the mother and the naked property to her children, it appears to us untenable. The true distinction between such a disposition and a substitution we take to be this, that in the former the naked property vests immediately on the death of the testator; there must therefore be some one *in esse*, having capacity at that time to receive, and clearly designated by the will, whereas the persons who are to take under a substitution may be unknown to the testator, or may not be in existence at the time of the making of the will. If in the present case the testator had named the children living at the time he made his will, had instituted them his heirs, and had provided that after the death of their mother

they should take the property, it might perhaps have been difficult to distinguish such a disposition from that permitted by art. 1509 of the Code. But it is evident that the testator had in contemplation the children that might exist at the time of the death of his sister, and that they were to acquire no rights whatsoever until the happening of that event. Had they all died before their mother, they could not have transmitted any title in this property to their own heirs; whereas the person to whom the naked property in an estate is bequeathed, has a right transmissible to his heirs, who may become absolute owners by the death of the usufructuary. We must then consider this will as containing a real substitution.

Judgment affirmed.

VICTOR HESTRES *v.* PETER PETROVIC and another.

Where a note is drawn by two persons, who are bound *in solido*, the endorser will be liable after notice, on proof of demand of either, and refusal of payment.

Notice of protest to an endorser who had left the country with the intention of remaining abroad, served on his agent, will bind the former.

As a general principle, an administrator cannot create any liability binding on the estate, though he may, on receiving payment, discharge a debt due to it; and if he discount a note received in payment on the sale of property belonging to the estate, his endorsee will have a claim against him personally, and cannot be compelled to wait for payment in the ordinary course of administration.

THIS was an action before the District Court of the parish of Natchitoches, *Campbell*, J., by the plaintiff against Petrovic and Jean Baptiste Trezzini, on a note drawn by Petrovic and one C. J. Hardy, and endorsed by Trezzini. A judgment by default against Petrovic was not set aside. Trezzini answered by denying all the facts and allegations in the petition, adding that if he endorsed the note, it was in his representative capacity, and that he was therefore not personally liable. The note was endorsed 'J. B. Trezzini, *administrateur*.' There was a judgment against the defendants, *in solido*.

Carr and *Pierson*, for the plaintiff.

Roysden, for the appellant.

MARTIN, J. Trezzini, one of the defendants, is appellant from a judgment against him as endorser of Petrovic and Hardy. His counsel has assigned for error apparent on the face of the record, that payment was not demanded of Hardy, one of the makers of the note, and that no notice of the protest was ever served on the appellant. The two makers being bound *in solido*, the endorser is liable on the demand of and refusal by either of them. The notice of protest was served on Sampeyrac, as agent of the appellant, who had left the country for Italy. Lamié deposes that the appellant told him that he was going to Italy, and did not intend to return; that he had appointed Sampeyrac as his agent, that he was his *chargé dés affaires*—that he was his general agent during his absence. The notary deposed that the cashier of the bank in handing him the note to be protested, instructed him to give notice to Sampeyrac, the agent of Trezzini; that, accordingly, he called on Sampeyrac, and asked him whether he was Trezzini's agent, and was answered affirmatively; and that on giving the notice, he was instructed if he had any other notices to serve on Trezzini, to hand them to his (Sampeyrac's) clerk. Sampeyrac being examined deposed, that during Trezzini's absence he acted as his agent, and was authorized to collect notes, a list of which was given him; and on his cross examination he stated that at the foot of the procuration Trezzini gave him, he wrote that he owed nothing, and referred to a bundle of receipts. The procuration was to collect and not to pay; he was authorized to furnish the necessary supplies to Trezzini's plantation. Before Trezzini left this country for Italy, he gave public notice of his intended departure for that country. It does not appear to us that the district court erred, in considering the notice as duly served.

It is lastly urged, that the appellant endorsed the note as administrator of the estate of Rachal, and consequently incurred no personal responsibility. As a general principle an administrator cannot create any liability on the estate by his contracts, although he may discharge any debt due to the estate, on receiving payment. If therefore he discount a note which he has received in payment on the sale of any property of the estate, his endorsee has a claim against him personally, and cannot be compelled to wait for payment in the ordinary course of the administration. We do not wish to be un-

derstood as intimating an opinion, whether or not, if a creditor of the estate were to receive from an administrator a note given for the purchase of any property of the estate, the administrator could resist the creditor's claim on him personally, if the note were protested. Nothing shows in the present case, that the transfer of the note had any relation to the affairs of the estate. 5 Martin, N. S., 530. 8 Id., 451. 12 La., 188.

Judgment affirmed.

THOMAS LAY v. JACOB IRWIN.

Damages will not be allowed, where the appellee prays for and obtains an amendment of the judgment.

APPEAL from the District Court for the parish of Claiborne, *Campbell*, J.

MARTIN, J. The defendant is appellant from a judgment rendered against him on his three promissory notes. He has built a hope of having his case remanded on the refusal of the lower court to grant him a continuance, and has drawn our attention to his bill of exceptions thereto, by which it appears that a continuance was refused on the ground of the insufficiency of the affidavit, because it did not show either that the evidence expected to be obtained was material, that due diligence had been used to procure the required testimony, or that the application was not made for delay. It does not appear to us that the continuance was improperly refused.

The plaintiff and appellee has prayed that the judgment may be so amended that the sum of one thousand dollars due the 1st of March, 1839, bear ten per cent interest, and the sum of three hundred dollars due the 21st of October, 1839, bear ten per cent interest, and that he may have damages for a frivolous appeal. The plaintiff is entitled to interest at the rate of ten per cent on the note of one thousand dollars payable on the 1st day of March, 1839, that rate of interest being expressed on the face of the note; the judgment gives interest without stating any rate, which is evidently *a lapsus calami*. He is also entitled to interest on the

sum of three hundred dollars, the balance due him on another of the notes, although no interest be mentioned in the note, because the money is due for the purchase of a tract of land, not indeed at ten per cent as he requires, but at five per cent. The plaintiff and appellee having availed himself of the defendant's appeal, and having obtained an amendment of the judgment in his favor, is not entitled to damages.

It is therefore ordered that the judgment of the district court be reversed; and that the plaintiff recover from the defendant the sum of twenty-three hundred dollars, with interest at ten per cent on the sum of one thousand dollars from the first day of March 1838; and interest at the same rate on the sum of one thousand dollars from the first of March 1839; and lastly, interest at the rate of five per cent on the sum of three hundred dollars from the first of March 1837, with costs in both courts.

Roysden and *Lawson*, for the plaintiff.

Crain, for the defendant and appellant.

WARREN H. MANADUE *v.* ISAAC FRANKLIN and another.

Where, by agreement between the parties, a judgment has been confessed, on an express stipulation of certain conditions as to the time and manner of its execution, the conditions will be obligatory.

THE plaintiff applied to the District Court of the parish of Rapides, *Boyce*, J., for an injunction to stay all further proceedings by the defendant Franklin, and James M. Wells, sheriff of that parish, under an execution in favor of Franklin, on a judgment against William B. Williamson, Eli M. Justice, and himself. The injunction was granted, and a judgment rendered as stated in the opinion of the court, from which Franklin appealed.

Brewer, for the plaintiff.

Brent and *Ogden*, for the appellant.

MARTIN, J. The petition states that in November, 1837, the present defendant obtained a judgment against Wm. B. Williamson, Eli M. Justice, and the present plaintiff, *in solido*, for the sum of twenty

thousand three hundred and eighty-eight dollars, with ten per cent interest on different parts thereof from different periods. This judgment was entered by consent, with a stay of execution until the 1st of March, 1838, when on payment of six thousand dollars a further stay was to be had, &c. The sum for which judgment was thus taken, was the price of a number of slaves bought by Williamson, then in community with his wife, the plaintiff's mother. The judgment recognizes Franklin's mortgage and privilege as the vendor of those slaves, and it was agreed that the judgment should be first executed upon them. In November, 1838, Williamson absconded, without having paid the second instalment, and leaving several other debts unpaid. A few days afterwards, the aforesaid slaves, or a large number of them, with other community property, were seized on an execution issued on said judgment, but on the 7th day of January, 1839, the community was dissolved by her death.

The community property was sold under a decree of the court of probates, with the exception of the real estate, including that which had been seized as aforesaid, on a credit of twelve months. The above judgment debt was the oldest judgment of record, and had precedence of all other mortgages. The amount of probate sales was twenty-nine thousand dollars. Franklin made no opposition to these probate proceedings. In February, 1839, a further sale of community property was effected, and produced ten thousand and sixty-nine dollars. At the maturity of the notes taken at those sales, the estate of the late wife of Williamson was unrepresented, and continued so until sometime in December, 1840, when the present plaintiff qualified as administrator, and was advised by Franklin to divide these notes among the community creditors. Accordingly, with the consent of the other creditors, Franklin received several of these notes, amounting to nineteen thousand dollars, and agreed to take the present plaintiff's personal obligation for the balance of the judgment; nevertheless, Franklin has caused an execution on his judgment to be levied on a tract of land owned partly by the said community, and partly by the late wife of Williamson, the present plaintiff's mother, in contempt of his engagement aforesaid. On a petition to that effect, the sale of the above tract of land was enjoined. All the allegations of the petition were denied. The district court sustained the injunction until such por-

tion of the price of the mortgaged slaves mentioned in the judgment of Franklin against Williamson, Manadue, and Justice, as Franklin may be entitled to, shall first be applied to the payment of said judgment, and until such dividend as he may be entitled to from the proceeds of the property of the community of William B., and Delilah Williamson shall be applied likewise in a regular course of administration, and ordered that until then he be not permitted to take out execution against the property of the present plaintiff. The defendant, Franklin, appealed. The record shows that one of the conditions of the confession of judgment was that the mortgaged slaves should first be proceeded against, and that the community property should be held liable before execution should issue against Williamson's co-defendants, Justice, and the present plaintiff. The inventory of the succession of Delilah Williamson, and of the property of the community between her husband and herself, amounted to one hundred and seven thousand nine hundred and thirty three dollars. The plaintiff is curator of Williamson, an absentee, and administrator of the estate of Delilah Williamson, his mother. Williamson, before his departure, had paid the first six thousand dollars, on the payment of which the issuing of the execution was to be protracted. Brent, Franklin's attorney, deposed that he received from the present plaintiff, as administrator of his mother, notes resulting from the sale of her estate, to the amount of eighteen thousand dollars; he did not give any receipt therefor, conceiving they were put in his hands that he might apply the proceeds to Franklin's judgment; and on his cross-examination, he repeated that he had not received the notes in payment of the judgment, but that he was to apply the proceeds thereto. The sheriff deposed, that Brent in handing him the execution, instructed him to levy on the slaves specified in the execution; and the plaintiff being requested to point them out, replied that they had been sold at probate sale, except four which were in his possession, and which he declined to point out. This being reported to Brent, he directed the execution to be levied on the land. The statement of facts further shows, that the plaintiff finding that Brent considered the notes as placed in his hands merely for the purpose of collection, desired that he might return them, and that he might make another appropriation of them. We have consider-

ed this case in the point of view most favorable to the defendant, which is, as his attorney declares, that the plaintiff gave him notes, the proceeds of the sale of the community property, including the mortgaged slaves, for collection, on a promise that the proceeds should be applied to the discharge of the judgment. This judgment was confessed on an express stipulation that the execution should be first levied upon those slaves. With the consent of Franklin, the plaintiff in that suit, those slaves were sold, with other property of the community; and he consented to receive the notes of the purchasers, and to apply the proceeds of them to the discharge of the judgment—in other words, to exercise on the proceeds of those notes, the rights which he was bound to exercise upon the slaves. The district court, therefore, correctly held him to a strict performance of his engagement. A second stipulation in the confession of judgment was, that the property of the co-defendants of Williamson should not be levied on, until the community property was exhausted.

Judgment affirmed.

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GEORGE W. COPLEY *v.* EBENEZER HUBBARD FLINT and another.

The action of rescission for lesion, was intended for the protection of those, who have been driven by their necessities, or have, through weakness or improvidence, suffered a loss on the sale of land of more than half its value.

Plaintiff was purchaser of a piece of land containing two thousand acres, and valued at six thousand dollars, belonging to an absentee, sold by order of the police jury to defray the expense of repairing a road passing through the tract, for two hundred and seventy dollars; afterwards sold his title, without warranty, to defendants, for twelve hundred and fifty dollars; part of this amount not being paid, he tendered what had been received, with interest, and prayed for a rescission of the sale on the ground of lesion beyond a moiety, or for a judgment for the balance of its value: *Held*, that plaintiff's object being to make a further profit, and not to protect himself from the consequence of his own weakness or improvidence, he did not bring himself within the provisions of the Code, and that an action of lesion would not lie.

THE judgment from which this appeal is taken, was rendered by the District Court of Ouachita, *King*, J. The plaintiff alleges, that he sold to the defendant, Flint, for the sum of one thousand

two hundred and seventy dollars, a tract of land in the parish of Ouachita, which he had purchased at public auction as the property of Daniel W. Cox, the other defendant; that though in the conveyance which he executed to Flint it is stated that this sum had been received by him in cash, he had in fact received but two hundred and seventy dollars, having taken a note for the balance, which was never paid. He avers that the land was worth ten thousand dollars; that he was imposed upon by Flint, and that there was lesion beyond a moiety of its value in the sale; and that he had tendered to Flint the amount actually received, with interest, and the note he had given him. The petition concluded with a prayer for a rescission of the sale, or a judgment against Flint for the balance of the actual value of the land. A second petition was filed, several months after, in which the plaintiff alleges, that for the purpose of avoiding the action commenced against him, Flint had conveyed the land in question to one Daniel W. Cox; prayed that the action against Flint might be consolidated with the one instituted by this second petition; that Cox, an absentee, might be cited through his attorney in fact; that the sale might be rescinded both as to Flint and Cox, that he be put into quiet possession of the land, and for five thousand dollars as damages. The two suits were consolidated.

Cox, by his attorney in fact, answered by denying all the allegations in the petition; he alleged that he held the land by an act of sale, executed before the commencement of plaintiff's suit; that his vendor exhibited to him a deed from the plaintiff for the land, in which the latter acknowledged that he had received full payment therefor; and that the only title plaintiff ever had was derived from an informal sale by the parish judge of Ouachita, who had sold the land, as the respondent's, for taxes assessed by the police jury for the repair of roads; which sale he alleged to have been illegal and void.

Flint denied the allegations of the plaintiff generally. He averred that he purchased the land from the plaintiff for twelve hundred and seventy dollars cash; and that the latter had bought it at a public sale for two hundred and seventy dollars; but contended that the sale to plaintiff was null and void, for various reasons. He alleged that the plaintiff sold him his title to the land only six days after he had purchased it, for an amount nearly five times as

great as plaintiff had paid for it; that the latter sold him only such a title as had been acquired by the purchase at the sale by order of the police jury; that respondent's brother, M. P. Flint, recently deceased, had been acting as the agent of Cox, who resided in Philadelphia; that he was one of his brother's executors, and had made the purchase of plaintiff to avoid litigation, and for the purpose of transferring the land to Cox, its real owner, which he had done before the commencement of the present suit; that the plaintiff knew of his intentions, and that neither ever contemplated a sale of a legal title to the land, but only of such precarious claim as the plaintiff had acquired by his purchase.

On these pleadings and the evidence introduced, the case was submitted to a jury, who, under instructions from *Wilson*, J., found that the land contained two thousand acres, worth three dollars per acre; but returned a verdict for the defendants, on the ground that they had not been put *in mora*. The plaintiff appealed, and a decision was rendered at Alexandria, in October, 1840, reversing the judgment, and remanding the case for a new trial, with instructions to the judge below. See 16 La., 380.

The evidence taken on the former trial, was used, by consent, on the second trial of this case, and, with other testimony, established the facts stated in the opinion of the court. The jury again found that the land contained two thousand acres, worth three dollars the acre; they further found that Flint had given two hundred and seventy dollars cash, and his obligation for one thousand, which had never been paid; and they returned a verdict for the rescission of the sale, on the repayment to Flint of the money advanced by him, with interest, and on the return of his obligation. Judgment was rendered by the court in conformity with the verdict of the jury, but allowing the defendants the election of retaining the land on returning to the plaintiff, within six months after notice of judgment, the sum of five thousand seven hundred and thirty dollars, an amount sufficient to make up the full value of the land, with interest at five per cent from the institution of the suit.

Bullard, J. This case was before us at the last October term, and was then remanded for a new trial. See 16 La. 380. The result of the new trial was a judgment against the defendants, and they have appealed.

After an attentive consideration of the case, and an examination of all the evidence laid before the jury, we find it impossible to concur with them in the result to which they have come. We cannot regard this, under all the circumstances, as a case for which the law affords relief on the score of lesion; a relief founded upon the idea that the vendor has been driven by his necessities to make a sacrifice so enormous, as to give rise to the presumption that he has been hardly dealt by. On the contrary, it appears to us to have been intended by the parties at the time to place Cox in the situation he was in previously to the forced sale, and that it was a mere redemption of the land by Flint, whose brother had been the agent of Cox in the sale of his Ouachita lands, with a view to reinvest in Cox his original title. It is shown that two thousand acres of land had been purchased a few months before by the plaintiff, for two hundred and seventy dollars. He sells it shortly afterwards to Flint for a profit of one thousand dollars, without any ultimate responsibility as warrantor, and he has avowed in the presence of this court in the argument, that if the thousand dollars had been paid, this suit would never have been instituted. In that event, he would have been satisfied with the profit of one thousand dollars, made in the purchase and resale of the land of the absentee. But because the purchaser does not comply with his contract in the payment of the stipulated price, he seeks to avail himself of the equitable action of rescission for lesion beyond a moiety of the just price, and thereby, in the event of success, to add upwards of four thousand dollars to his profits, or compel both Flint, and Cox to whom the land had in the mean time been reconveyed, to surrender it to him, free from any doubts as to title growing out of the forced alienation. If we were to tolerate this, we should sanction a resort to an action of rescission, intended for the protection of weakness or improvidence, when presumed to have been overreached in a hard bargain, in a case in which it is evident the plaintiff's sole object is a further gain and speculation. He comes before us avowedly as one '*qui certat de lucro captando.*'

The evidence laid before the jury shows the low estimate in which titles such as the plaintiff acquired, were held in Ouachita. The particular circumstances attending this sale, are not shown by either party. It was proved that on one occasion, twenty five

thousand *arpens* of the Maison Rouge grant, then belonging to Cox and Turner, were sold by a commissioner appointed by the police jury to make a short road through the grant. One witness testified that lands sold by order of the police jury for making roads, usually sell very low; that lands sold ten years ago under similar circumstances, are now extremely low, in consequence of the title being thought defective; but he adds that it was thought the sales last made by the police jury, that is, those under which the plaintiff purchased, were made with unusual care and were good. If the plaintiff, who is a member of the legal profession, had been of opinion that he had acquired a valid title as against Cox, it may be well doubted whether he would have sold a tract of land worth $6000 for $1270. The estimate which he placed upon it when he bid at the auction sale, was probably considered by him a fair one, considering all the difficulties attending similar alienations. Be that as it may, he has made a profit of one thousand dollars, and we are of opinion that he does not bring himself within the provisions of the Code, which promises relief to vendors who have suffered lesion in the sale of their lands to the extent of more than half their just value.

It is therefore ordered that the judgment of the district court be reversed, the verdict set aside, and that the judgment of this court be for the defendants, with costs in both courts.

Downs, and *Copley*, *propria persona*, for plaintiff.

McGuire, *Thomas*, and *Flint*, for defendants.

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FREDERICK GLOVER, and others, Heirs, &c., v. EDWARD DOTY.

A decree of the Court of Probates admitting certain persons as heirs, is *prima facie* evidence of their being so, though such a recognition will not preclude other heirs, or even debtors of the estate, from showing the contrary; but until this is done, the decree of the Court of Probates must be held sufficient evidence of heirship.

Where a note is made payable at a future period, with interest from date if not punctually paid, such interest is in the nature of a penalty for not punctually performing the principal obligation, and the failure to do so must be strictly proved to entitle the plaintiff to recover the additional interest. Where such a note was payable at a particular place, proof that it was presented and demand of payment made at such place 'after it fell due,' will not entitle the holder to recover the additional interest.

THE plaintiffs, as heirs of Ruth Noble, for the use of Jones Glover, obtained a judgment against the defendant as one of the drawers of a promissory note, for the principal sum for which it was given, with interest at five per cent from judicial demand. The case was tried before the district court of Catahoula, *Boyce*, J.

BULLARD, J. The plaintiffs allege that they are the heirs and legal representatives of Ruth Noble, deceased, and as such, sue upon a promissory note given by the defendant, Doty, *in solido* with Joseph Williams and James McCoy, for purchases made at the sale of the property of her estate, then administered by a curator. The note calls for interest at ten per cent from date, if not punctually paid. The defendant in his answer admits that he signed the note, but he denies that the plaintiffs are the heirs and legal representatives of Ruth Noble, to whom the same was made payable He further alleges that the note was given in error. There was judgment for the plaintiffs, and the defendant appealed. His counsel contends that the court below erred in holding that the recognition of the plaintiffs as the heirs at law by the court of probates, was conclusive upon the defendant, who was a debtor of the estate; and he contends that the judgment of that court admitting them as heirs, is *res inter alios acta.*

We are of opinion that the recognition of the plaintiffs as heirs, by the court of probates, furnishes at least *prima facie* evidence of their being so, and would have justified a payment made to them by the defendant. It is to that court that absent heirs, to whom

estates have fallen in this state, which have been administered by curators, are to address themselves in order to call such curators to an account; and although such recognition would not preclude other heirs who should afterwards appear, nor even a debtor of the estate from showing that other persons are in fact heirs, yet, until such other person is named, and evidence offered to show his heirship in preference to those who may have been admitted by the court of probates, which has not been done in this case, such evidence of heirship must be held sufficient.

The defendant further contends, that he cannot be condemned to pay the back interest, stipulated to be paid from the date of the note, in the event of the note itself not being punctually paid at maturity, because it is not shown that payment was demanded at the Gas Light Bank, where it was made payable, at maturity. The plaintiffs' attorney testifies, that *after the note fell due*, he presented it for payment at the bank; he is not positive that he did so, but feels satisfied in his own mind that he did; he intended to be particular in the matter, and not to omit any formality. Admitting that this testimony shows a demand of the note at the place where it was made payable, yet it shows that the presentment was *after the note was due*, and not at its maturity. The back interest is in the nature of a penalty for not punctually performing the principal obligation, and his failure to do so must be strictly proved. The makers may have had the money ready in bank on the day the note fell due, and have withdrawn it when they found that the note did not make its appearance. The court, in our opinion, erred in allowing the interest.

It is therefore ordered that the judgment of the district court be reversed, and that the plaintiffs recover of the defendant, Edward Doty, seven hundred and twenty seven dollars and fifty cents, with five per cent interest from the 4th of August, 1840, the date of the judicial demand, until paid, with costs in the district court; those of the appeal to be paid by the plaintiffs and appellees.

Mayo, for the plaintiffs.

McGuire and *Ray*, for the appellant.

ZACHARIAH H. DORSEY v. JOHN D. HARDING, Sheriff, and another.

An assignment of errors may be filed at any time within ten days after the record is brought up, where the case has not in the meantime been fixed for trial; but when, by agreement, tacit or otherwise, the case has been fixed before the expiration of the ten days, such assignment must be filed in time to give the opposite counsel an opportunity of knowing what he has to contend against; and one day, at least, should be allowed for this purpose.

The appeal will be dismissed where the certificate of the clerk shows, that the record does not contain the parol evidence adduced in the trial, and that the parol evidence was not reduced to writing, and there is no statement of facts, bill of exceptions, nor assignment of errors.

APPEAL from the District Court for the parish of Carroll, *Tenney*, J. This was an action against John D. Harding, sheriff of the parish of Carroll, and Susan Elizabeth Tompkins, tutrix of J. M. Tompkins, to enjoin the said Harding from selling certain negroes seized under an execution in the suit of J. M. Tompkins against E. F. Atchison et al. The injunction was dissolved with damages. The certificate of the clerk stated, that the record was 'a correct transcript of all the proceedings had, of all the papers and documents filed, as well as of all the evidence adduced by the parties, except the parol testimony which was not reduced to writing.'

Copley, for the plaintiff and appellant.

Selby, for the defendants.

GARLAND, J. The plaintiff is appellant from a judgment dissolving an injunction obtained by him. The defendants filed a motion to dismiss the appeal, because the certificate of the clerk shows that the parol evidence given on the trial was not taken down, and does not come up with the record. There is no statement of facts, bill of exceptions or assignment of errors. The counsel for the plaintiff waived the opening; the counsel for defendants proceeded to argue his motion to dismiss, and was proceeding with his objections, when the counsel for the plaintiff rose and offered to file a paper, which to that moment had been in his possession, which he said was an assignment of errors apparent on the face of the record. Defendants' counsel objected to the paper being then filed, as the cause had been fixed for trial without objection, and the argument had commenced. The appeal was returnable on the first day of the present term,

when, without objection, the cause was fixed for trial on the fourth day thereof. The plaintiff's counsel contended, that by article 897 of the Code of Practice, he had a right to file his assignment of errors at any time within ten days after the record is brought up. There is no doubt of his right to do so, if the cause has not been fixed for trial in the meantime; but if a party agrees directly or tacitly to a day being assigned for trial before the expiration of the ten days, then he must file his assignment of errors in time to give the appellee's counsel an opportunity of seeing them, and knowing what he has to contend against; and we think, at least one day ought to be allowed for that purpose. In this case the plaintiff had gone to trial, and it was certainly too late to change the issues between the parties; we therefore overrule the motion to file the assignment of errors.

Upon the question of dismissal, we see no distinction between this case and that of *Roberts* v. *Benton*, just decided, *ante* p. 100.

The appeal is therefore dismissed with costs.

SQUIRE W. MCCLURE and another, Executors, v. GEORGE W. COPLEY and another. 1r 133 114 445

The purchaser of a slave who has given his note for the price, and afterwards sold to a third person who binds himself to pay the note due to the original vendor, when sued by the latter will be entitled to a delay to cite such third person in warranty.

APPEAL from the District Court of the parish of Ouachita, *King*, J. McClure and one James D. Fenner sue as executors of the will of Samuel D. Brown, deceased, for the amount of a promissory note of George W. Copley and George Jessup.

McGuire, for the plaintiffs, contended that arts. 379—382, of the Code of Practice, give the defendant no right to time to call his vendee in warranty; that he would be entitled to such delay only in case of privity between the plaintiff and such second vendee. 1 La., 37. 8 Ib., 37. *Merlin Rep.*, verbo Garantie simple.

Copley, propria persona, for the appellants. Where a third

person has assumed to pay a debt due by defendant to plaintiff, the former is entitled to the necessary delay to cite such third person in warranty. Code of Pr., 378, 379, 423. 6 Martin, N. S., 391, 458. 7 Ib., 331. 14 La., 498.

GARLAND, J. The defendants are appellants from a judgment rendered against them for the price of a slave purchased by Copley at the probate sale of the estate of Samuel D. Brown, deceased, for which he and his co-defendant gave their promissory note. Sometime after, Copley sold the slave to one Peck, who expressly covenanted and agreed to pay the note of defendants to Brown's estate, and in all things in relation to said note to save them harmless. In the court below, the defendants in their answer set forth all the facts, and attach to it a copy of the sale to Peck, and call upon him to defend them, and asked the legal delay to have their warrantor cited. This was objected to by the plaintiff's counsel, and the court overruled the motion, and the defendants excepted. This is the only point in the case, and we think the court erred in not granting the delay. The articles 379, 380, 381 of the Code of Practice seem too clear and imperative to admit of doubt as to their construction. In the case of *Anselm* v. *Wilson*, 8 La., 37, it was held that as there was no privity between the plaintiffs and Erwin, who was to reimburse the note to defendant, that delay would not be accorded to call him in. The agreement in that case was not that Erwin would pay the plaintiff the defendant's debt, but that in case she had to pay it, he (Erwin) would reimburse her. The contingency was not to operate on Erwin, until it was known whether the defendant had to pay. The court in that case went as far as it well could to avoid the effect of a positive law, which, in its operation in the country, is calculated to produce delay in the collection of debts, and considerable embarrassment to creditors. We are bound to execute the law in all cases, however hard its operation may be, when it appears that its provisions are not seized upon to evade the administration of justice, and the collection of just debts. In this case we see nothing in the conduct of the defendants at all suspicious.

The judgment of the district court is therefore reversed, and this case remanded to the district court, with directions to permit the defendants to call Alexander D. Peck in warranty, and other-

wise to be proceeded in according to law; the plaintiffs paying the costs of this appeal.

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George Currie Duncan v. Lucius W. Elam.

Where one who has sold a tract of land and slaves, and received in payment from his vendee notes secured by mortgage on the property, takes back the land and gives up the notes with the exception of one equal to the value of certain slaves retained by his vendee, which he endorses; on an application by the holder for an order of seizure and sale *held*, that the vendor being personally liable for the debt, cannot be considered as a third possessor, and entitled to the notice required by the Code of Practice, art. 69. A third possessor is one, who not being liable for the debt, has the privilege of discharging himself by abandoning the mortgaged premises.

Where on an application for an order of seizure and sale, the act of mortgage is annexed to the petition, which concludes with a prayer that the slaves mortgaged may be seized and sold, all the slaves mentioned in the mortgage may be included in the order of sale, though a part of them are not named in the petition.

On an application for an order of seizure and sale by the holder of a note endorsed by the defendant, and secured by mortgage on property sold by the latter to a third person by whom the note was made but subsequently reconveyed, proof of the recording of the original act of sale will not be necessary as against the defendant, he being owner and possessor of the property and personally bound for the debt.

By receiving a pledge from his debtor, a creditor incurs no obligation to grant a delay.

The endorsers of a note secured by mortgage, may, subsequently to the endorsement, execute an authentic act recognizing such endorsement, and an authentic subrogation of the mortgage to secure its payment.

Appeal from the District Court for the parish of Catahoula, *Wilson*, J.

Brent and *Ogden*, for the plaintiff.

Mayo, for the defendant and appellant, contended that the judgment should be reversed. 1. There is no evidence of ten days notice to the defendant, who is a third possessor, after the expiration of thirty days demand from the debtor. Code of Pr., 69. 6 Martin, N. S. 310. 4 La., 323–4. 2. The order of seizure and sale extends to two slaves not mentioned in the petition. 3. There is no allegation in the petition that the act of sale from Elam to Cuny and Taylor was recorded; without such allegation evidence

could not be offered to prove it, nor could the order of seizure and sale be granted without such proof. 12 Martin, 643. 2 Ib., N. S., 359. 3 Id., 225, 511. 5 Id., 38. 6 Id., 241-3. 1 La., 214.

MARTIN, J. The facts of this case are these: The defendant sold a tract of land and slaves to Cuny and Taylor, for a sum of money, which was to be paid in six yearly instalments of unequal amounts, for which he took their several notes, secured by mortgage. He negotiated one of them which was for nine thousand dollars, and afterwards took a retrocession from his vendees, who engaged to take it up, and in consideration of this, retained some of the slaves, which were excepted from the retrocession. This they failed to do, and the plaintiff became the holder of the note. The defendant being liable as endorser, pledged to the plaintiff a note of Jesse A. Bynum for eight thousand three hundred and thirty three dollars, secured by a mortgage; and the deed of pledge contains a clause by which the pledgor engages to pay the costs of any suit which the pledgee might be obliged or see fit to institute on said note, which was payable on the first day of January, 1841, but Bynum was at liberty to delay the payment until the first of March following. On the 23d of February, the plaintiff took out an order of seizure and sale to enforce the payment of the note out of the property originally mortgaged by Cuny and Taylor to the defendant. The latter took the present appeal from this order. His counsel has placed the case before us on the following assignment of errors. 1st. The affidavit is insufficient, the appellant being a third possessor, as it is not asserted that he had ten days notice after the expiration of thirty days demand on the original debtor. 2d. The order of seizure and sale incorrectly extends to two slaves, as to whom the petition is silent. 3d. The petition does not allege that the defendant's sale to Cuny and Taylor was duly recorded, it is not made part of the petition, and no certificate of record is mentioned. 4th. Bynum's note is no way accounted for. 5th. The authentic transfer of the mortgage by the plaintiff's endorsers was made after the endorsement of the note, when they had no interest therein, nor in the mortgage by which its payment was secured.

I. The appellant being personally liable for the debt, cannot be considered as *a third possessor* in the extent of the word. It is of

the essence of third possession, that the possessor, not being liable for the debt, has the faculty of discharging himself by abandoning the mortgaged premises.

II. It is true that the two slaves alluded to, are not named in the petition, but they are in the act of mortgage which is annexed to the petition, and which concludes with a prayer that the slaves mortgaged may be seized and sold.

III. With regard to the defendant, who is the owner and possessor of the slaves, and personally bound for the debt, no recording is necessary.

IV. The plaintiff received Bynum's note, not in payment, but in pledge; it was not yet payable at the date of the order of seizure and sale; the deed of pledge left him at liberty to sue or not; the pledgor promissing to pay the costs which the plaintiff might incur in any suit he might be obliged or see fit to institute. He was not *in mora* when he prayed for this order of seizure and sale, nor is it alledged that he is so at this time. The creditor who receives a pledge from his debtor, does not thereby incur any obligation to grant him a delay.

V. The plaintiff's endorsers might well, after their endorsement, give him an authentic act recognizing their endorsement of the note, and an authentic subrogation of the mortgage which had passed to them with the note it was intended to secure.

Garland, J., dissenting. This suit was commenced by executory process, against the defendant, as the endorser of a promissory note, and on a subsequent agreement to pay it. The petition charges him as being personally responsible, and also as the third possessor of the property mortgaged to secure the payment of the note.

It appears that Elam, in March, 1837, sold to P. M. Cuny and W. H. Taylor, a plantation and slaves in the parish of Rapides, for sixty thousand dollars, and took their several notes, with mortgage to secure the price, among them the note now proceeded on, which he, Elam, had transferred to the plaintiff by endorsement. Sometime after this, Cuny resold or retroceded to Elam all his right and interest in the plantation and slaves, and all the notes given were returned, except the one sued on amounting to nine

thousand dollars, and one other of one thousand five hundred dollars which Cuny agreed to pay, in consideration of which, Elam permitted him to retain the title and possession of seven valuable slaves; and the whole original sale was thus cancelled. The reason these two notes were not given up, was because Elam had transferred them to Barrett & Co., from whom, through an intermediate person, they had gone into the hands of the plaintiff. The note now sued on, not being paid at maturity by Cuny and Taylor, was protested, and notice given to Elam as the endorser.

On the 19th December, 1840, Elam went before a notary in New Orleans, and acknowledged that he was indebted to plaintiff in the sum of nine thousand dollars, and interest, as endorser of the promissory note aforesaid, which was secured by the mortgage from Cuny and Taylor, to him, Elam. 'And the said Elam being desirous to secure unto said Duncan the payment of the above described note, and the interest thereon until final payment, and for which he is bound unto said Duncan as endorser thereon, as above set forth.—Now therefore, he, Elam, does hereby pledge and pawn as collateral security, in favor of said G. C. Duncan here present, and accepting for himself, &c.,' a promissory note drawn by Jesse A. Bynum, to the order of and endorsed by said Elam, payable on the 1st of January, 1841, for the sum of eight thousand three hundred and thirty three dollars and thirty three cents, with interest at ten per cent from January 1st, 1839; the payment being secured by a mortgage, &c.; said Bynum having the privilege of postponing the payment of the note until March 1st, 1841, by paying ten per cent interest. And for the purposes above stated, Elam transferred and subrogated Duncan to all his interest, rights and actions, hypothecary or otherwise, against Bynum, on the note and mortgage in case of non-payment. And in case Duncan should be obliged, or see fit, to commence legal proceedings by suit or otherwise, Elam covenanted to pay all costs and expenses attending the collection of Bynum's note.

Bynum's note, due on the 1st of January, 1841, was not paid on that day. Duncan took no steps to collect it, nor did he wait until the expiration of the term to which he, Bynum, had a right to postpone the payment, to wit: the 1st of March, 1841, but on the 22d of February, 1841, without making any effort to make

Cuny and Taylor responsible, or to proceed against the plantation in the parish where the sale was passed, or returning to Elam the note of Bynum, the plaintiff commenced this executory proceeding against Elam in a parish where the slaves only, were in his possession, and set up this act of pledge as the ground of his being directly liable.

Without the act of pledge, it is perfectly clear to my mind, that no direct executory proceedings could have been had on the part of the plaintiff against the defendant. Duncan had no right to proceed directly on the original mortgage from Cuny and Taylor to Elam; there being no subrogation as to him, Elam, stood responsible only as endorser of the note and third possessor of the property. The act of pledge is therefore the basis of his action; without it, the plaintiff would have no right to the process he has obtained, and I do not think he should have the benefit of such summary measures as have been taken, without complying with a single stipulation on his part, or offering to surrender the note pledged.

The plaintiff, not satisfied with a lien on a tract of land and slaves, estimated in 1837 to be worth sixty thousand dollars, to secure the payment of nine thousand dollars, induces the defendant to pledge to him a note secured by mortgage for nearly the same sum, and in a few weeks after, without waiting until the expiration of the time, to the end of which Bynum had a right to postpone the payment of his note, proceeds with an order of seizure and sale, without returning the note pledged. One means by which the defendant might have raised the money to have satisfied the debt he owed, was taken from him by the act which entitled the creditor to the process he has resorted to; and I think he ought to restore it, or carry out the contract in good faith, by making some effort to coerce Bynum to pay his note. It is administering the law in a mode that gives every thing to the creditor, and oppresses the debtor in a manner not contemplated by the contract.

After a careful examination of the facts of the case, I am of opinion that the opposition of the defendant should be maintained.

Judgment affirmed.

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LESTOR THAYER v. WILLIAM LITTLEJOHN and others.

Where a landlord, instead of resorting to the means provided by law for obtaining payment of his rent and possession of his premises, takes upon himself, without authority, to remove the property and to turn out the family of his tenant, he will be liable in damages; and it will be no excuse, that such removal was effected without violence or injury.

Damages for a frivolous appeal cannot be granted by the court, where they have not been asked for by the appellee.

WILLIAM LITTLEJOHN is appellant from a judgment rendered against himself and four others, jointly, by the District Court for the parish of Caddo, *Campbell*, J.

Gilbert, for the plaintiff.

Crain, for the appellant.

MARTIN, J. The plaintiff, tenant of a log house, was absent from home, when the defendant, Littlejohn, accompanied by his four co-defendants, came to execute a *frontier process for rent arrear*. They began, by carefully putting out of doors, the table, chairs, and the rest of the furniture; and afterwards led out of the house the wife and two children of the plaintiff, the only persons therein; and finally, took out a box, which laid in a corner of the house, in which a feathered animal was rendering the first maternal duties to her future progeny. They did so with so much care, that she was not at all disturbed; and none of the frail shells, which inclosed the unborn brood, came in such contact with the sides of the box or with each other, as to occasion a premature birth. The defendant next unroofed the house, and took down so many of the logs as to render it uninhabitable. The plaintiff sought relief in the district court by the present suit. The defendants pleaded the general issue. There was a verdict against them for three hundred dollars. They made an unsuccessful attempt to obtain a new trial, and the present defendant has appealed. The facts were clearly proved. Evidence was admitted without opposition, to establish that the plaintiff is a man of bad character, addicted to hard drinking, and not a very strict observer of one of the ten commandments. The defendant's counsel in this court, has presented to us the above circumstances, the mild manner in which they turned out the plaintiff's family and furniture, and the difficulty the landlord had in obtaining his rent or possession of the

house, as an excuse for their conduct. The counsel has also urged that the district court erred in overruling a motion for a new trial, on the ground of excessive damages, the verdict being contrary to the law and evidence, and the defendant having been surprised, by the testimony of one of the plaintiff's witnesses, who testified that the plaintiff had a lease of the premises. An affidavit was filed stating that they had since discovered a witness, by whom this circumstance would be disproved, and another by whom they could prove, that the plaintiff had declared that he was a tenant at will only, and that he would deliver up possession of the premises whenever called upon.

We are perfectly satisfied, with the verdict of the jury, with the opinion of the court refusing the new trial, and with the judgment. Admitting all the facts which the defendants have alleged on their application for their new trial, it appears to us that they are without the least excuse. The law has provided various legal means by which landlords may obtain their rents, and the possession of their houses, and by which intruders may be turned out.

While we regret the obligation we are under of recording in our judgment a resort to force and violence by any of the inhabitants of the state, instead of an application to courts of justice, in redressing their grievances, we are much gratified by the opportunity of expressing our approbation of the due sense which those of our fellow-citizens who constituted the jury in the district court, manifested of their duty to prevent the recurrence of acts showing such disregard of the law, and all attempts to seek redress through violence and force, by persons who fancy themselves injured, or are really so. And we are surprised that the defendants should have conceived the idea that they could excite our sympathy or commiseration. We would have cheerfully granted damages for the frivolous appeal, if they had been asked, or if we thought ourselves authorized to grant them when not demanded.

Judgment affirmed.

Spencer Griffin v. Elijah B. Cotten.

Where one takes peaceable possession of a portion of the public domain, to which no other person has a claim, and possesses it in good faith, he will be protected to the extent of his enclosures.

The act of 25th March, 1831, relative to injunctions, is one of great severity, and must be rigorously construed. It applies only where judgments have been enjoined; in all other cases, the parties must be left to their action on the bond.

Appeal from the District Court for the parish of Rapides, *Boyce*, J.

Garland, J. Griffin alleges that on or about the 16th of October, 1840, he purchased at a sheriff's sale, made under an order of seizure and sale in his own name, against Valentine F. Cotten, several tracts of land, among which was one section No. 26, in township 4, north, range 2, west, in the Opelousas land district. That when he went to take possession of said land, he was forcibly resisted by the said Valentine Cotten, and his brother Elijah B. Cotten; he then called on the sheriff who made the sale, to put him in peaceable possession, which the sheriff was about to do, when Elijah B. Cotten got out a writ of injunction against him and the sheriff, to prevent it. In his petition, Elijah B. Cotten states that he had been in possession of the land about nine months; that it belongs to the United States, and that he has acquired a right of pre-emption to it, by virtue of an act of congress passed in 1840, granting pre-emption rights to settlers on the public lands, and that he feared Griffin and the sheriff would forcibly put him out of possession. He further states that he had made an application to the Register and Receiver of the proper land district, to purchase the land. Upon this petition an injunction was granted. Griffin afterwards took out a writ of injunction to prevent E. B. Cotten from destroying the timber and committing waste; and also a writ of sequestration to prevent him from taking away or selling a quantity of cord wood he had cut on the land.

The suits were consolidated in the district court; there was judgment giving Griffin possession of the land, dissolving Cotten's injunction, and condemning him and his sureties, jointly and severally, to pay two hundred dollars damages, from which he has appealed.

This is a possessory action on the part of Cotten against Griffin. He swears in his petition that he has applied to the land officers at Opelousas for a pre-emption. We have no evidence of that fact, and cannot presume it; but we find him making opposition in March and April, 1841, to a claim made by Griffin, to purchase the two lots or sections Nos. 26 and 27. He was himself examined on oath before E. E. Leckie, Esq., and stated that he had heard both Griffin and V. F. Cotten say, that these lots were included in the sale from the former to the latter, but he always understood that the land was public; that when he came to the country the land was cultivated, and in possession of both these persons; and that it so continued until Griffin sold his interest to V. F. Cotten, when he, E. B. Cotten, became the overseer or agent of his brother. That in 1840, he and his brother cultivated the land in partnership; his "services went to balance what land V. F. Cotten brought in more than he did;' and the cabins he built were within the enclosure made by Griffin and V. F. Cotten. Now, according to his own statement, he has taken possession of an improvement and enclosed field which he did not make, but which he knew was made by others, and we think he complains with a poor grace of being disturbed in the possession of it. If he is that honest settler in good faith, which it is contended he is, why did he not go like many others have done on land to which no claim was set up by any one, and improve it, and not endeavor to appropriate to himself the labor of others? Had he done so, this court would have afforded him all the protection which the laws extend to persons in that situation. But suitors must come before us with clean hands, when they ask for relief.

All the evidence in the record shows that E. B. Cotten has taken possession of an enclosure, which he did not make; he says in his petition that the land does not belong to him; he does not pretend that he has ever paid any one for it; he says he has a pre-emption right, but does not prove that he has made any attempt to exercise it, nor does he allege or show a possession of one year. We are therefore at a loss to understand how he can, under the articles 47 and 49 of the Code of Practice, maintain a possessory action. We have held that when a man takes peaceable possession of a portion of the public domain, to which no one else has a claim at the time, and

possesses it in good faith, the law will protect him to the extent of his enclosures, 19 La., 331; but the doctrine is novel to us, that an injunction can be maintained to arrest a sheriff engaged in putting a party in possession of what he has purchased under legal process, on the ground that the officer is about to proceed by force or fraud, to dispossess the petitioner. Such presumptions will not lie against the officers of justice. It is a little strange the plaintiff made no efforts to protect the rights he now esteems so just, previous to the sale made by the sheriff of the rights of his brother; for he informs us that he knew the sheriff had made a seizure of the land about four months previously to the commencement of these proceedings.

Upon a full consideration of the whole case, we cannot resist the impression that the proceedings of E. B. Cotten are an afterthought; and that he is interposing himself between Griffin and his brother.

Whether Griffin has any title to the land in question, or a right of pre-emption to it, we do not decide in any manner. Of the evidence he shall produce to sustain his rights, the land officers are the proper judges.

But we think the judge erred in giving damages when he dissolved the injunction. We have always held the act of 1831 relative to injunctions one of great severity, and have construed it rigorously, 10 La., 519; and in the case of *Morgan* v. *Driggs, &c.*, 17 Id., 176, we held that the act only applied when judgments were enjoined. In other cases, parties must be left to their action on the bond.

The judgment of the district court is affirmed so far as it decrees to Spencer Griffin the possession of the lot or section of land described as No. 26, in township 4 north, range 2 west; but so far as it decrees damages against E. B. Cotten and his securities on the injunction bond, it is reversed, reserving to Spencer Griffin, his right to proceed on the injunction bond against the principal obligor and his securities; the costs in the district court to be paid by E. B. Cotten, and those of this appeal to be paid by the appellee, Griffin.

Elgee, for the plaintiff.

Brewer, for the defendant and appellant.

The New Castle Manufacturing Company v. The Red River Rail Road Company.

Where a vendor, between whom and the defendant no privity exists, sells to the agents of the latter goods known to be for the use of their principal, but looks to such agents exclusively for payment, and after the failure of the latter to pay suffers more than fifteen months to elapse before applying to the principal, during which time he had settled with his agents, the principal will not be liable to such vendor.

Agents or factors of merchants residing in a foreign country are personally liable upon all contracts made by them for their employers, whether they describe themselves as agents, or not; in the contract. In such cases it is presumed that the credit is given exclusively to them, to the exoneration of their employers; but this presumption may be rebutted by proof that the credit was given to both, or to the principal only.

Appeal from the District Court for the parish of Rapides, *Wilson*, J. The facts of this case are stated substantially in the opinion of the court. In regard to the question, to whom the credit was given by the plaintiffs, Young, the superintendent of the New Castle Manufacturing Company, deposed, that the credit for the articles furnished by the plaintiffs, and for the price of which this action is instituted, was not given to the Messrs. Phillips, but to the defendants, the articles having been charged to the defendants by him, on the books of the plaintiffs, at the time of their shipment; and that the plaintiffs regarded the action of R. & J. Phillips as that of mere agents. The statement of this witness was corroborated by that of Reid, the assistant superintendent. Two members of the firm of R. & J. Phillips being examined stated, that they did not know whether the plaintiffs gave the credit to the defendants or not; and that they sent to the plaintiffs a copy of the original order of the defendants, which had been transmitted to them by Lizardi & Co., of New Orleans. One of the members of this last house, testified, that in their correspondence with R. & J. Phillips, no allusion had ever been made by either party to the plaintiffs; that he did not even know of the existence of such a company; and that his house had been under the impression that the articles ordered by them from R. & J. Phillips for the defendants, had been paid for by the Messrs. Phillips in cash, the latter having written to them

to that effect, and having drawn on them for the amount, which had been paid at sight. Another partner of the house of Lizardi & Co., confirmed the statements of the last witness, and deposed that he did not believe that the plaintiffs would have given the defendants credit for a hundred dollars. He further declared that R. & J. Phillips looked to the house of Lizardi & Co. for payment; that the former were never authorized by the firm of Lizardi & Co. to correspond with the defendants; and that he does not believe that any correspondence ever took place between them.

Dunbar and *Hyams*, for the plaintiffs and appellants.

1. The defendants contracted with the plaintiffs through the medium of an agent. The mandate to Lizardi & Co. was not strictly a personal one—it necessarily included the employment of others as direct or sub-agents of the defendants. Lizardi & Co. acted within their powers in employing such agents. Civ. Code, 2960, 2975. Merlin, Repert. Mandat, No. 235. In all mandates not of a strictly personal character, the power to substitute is implied, unless expressly denied. Civ. Code, 2976, 2977. Discussions of the Council on art. 1994 of the Code Napoleon (corresponding with art. 2977 of the Civ. Code of La.), in note to Pothier, Mandat, p. 217, Nos. 82, 449. 18 Duranton, 250, 261, 262. *Dubreuil's heirs* v. *Rouzan*, 1 Martin, N. S., 158. Civ. Code, 2981, 2982. Pothier, 449. *Krumbhaar* v. *Ludeling*, 3 Martin, 640. *Williams* v. *Winchester*, 7 Ib. N. S., 24. *Waring* v. *Cox*, 1 La., 200. *Hopkins* v. *La Couture*, 4 La., 64. *Hyde* v. *Wolf*, 4 Ib., 234. *Woolfe* v. *Jewitt*, 10 La., 390. *Lincoln* v. *Smith*, 11 La., 11. *Zacharie* v. *Nash*, 13 La., 21.

2. The agent of the defendants was authorized to deal on credit. Having a general power to act, the instructions of the principal are not binding on third persons. 1 Pothier Oblig., No. 79. Ib., Mandat, No. 89. *Brown* v. *Frantum*, 6 La., 47.

3. The articles have been received by defendants, and they have not paid the plaintiffs for them; nor is it proved that they had paid Lizardi & Co., before the institution of this suit.

Ogden and *Brent*, for the appellees.

1. Lizardi & Co. had no power to delegate their authority as agents of the defendants to R. & J. Phillips. *Delegatus non potest delegare.* Comyn on Contracts, 538, 544. 1 Bouv. Law

Dict., 108. 1 Harrison's Index, 25. Story on Agency, 13. Civ. Code, 2976, 2977.

2. The articles sued for were purchased by R. & J. Phillips on their own credit; the defendants are not responsible for their not being paid for. Plaintiffs having elected to give credit to R. & J. Phillips, cannot hold the defendants responsible. Comyn on Contracts, 553. 15 East., 62. Story on Agency, secs. 268, 287, 290, *and note* 2, p. 423. 1 Harrison's Index, 34, 42.

Morphy, J. The defendants are sued for the value of a certain number of sets of wheels, axles, boxes, and other machinery, which the plaintiffs allege they sold and delivered to them at their special instance and request, some time in December, 1836. The answer denies the facts set forth in the plaintiff's petition, and avers that the defendants are perfect strangers to the New Castle Manufacturing Company, and have never had any dealings with them; that they never contracted with them, nor authorized any one to contract with them in their name and on their account; and that the said company has no claim against them in law or equity. There was a verdict below in favor of the defendants. After vainly endeavoring to set it aside, the plaintiffs appealed.

The record shows that some time in July or August, 1836, the house of M. de Lizardi & Co., received instructions from the defendants to procure for their use the articles mentioned in the plaintiffs' petition; that in order to obtain them, they employed the house of R. & J. Phillips, of Philadelphia, who applied to the plaintiffs to execute the order, informing them that the articles were wanted by and were for the use of the Red River-Rail Road Company. The articles, when ready, were forwarded to R. & J. Phillips, who consigned them to the house of M. de Lizardi & Co. In two letters addressed to R. & J. Phillips by the plaintiffs, they enclosed the bills for the wheels and other articles they had furnished, and advised them that the amount had been placed to their debit. No correspondence whatever passed between the plaintiffs and defendants, nor between the former and the Lizardis, who never knew until after the institution of this suit, by whom the order had been executed. They declare that they sent the order to be executed on their own credit, and that shortly after receiving the goods they forwarded the amount to the Messrs. Phillips, in bills on England,

which have since been paid by the defendants. It further appears that on the 9th of December, 1836, the plaintiffs in a letter enclosing a general bill for the iron work furnished for the Red River Rail Road Company, advised R. & J. Phillips that they would be drawn on in a few days at short date therefor, and that the said R. & J. Phillips, in reply, requested that no draft should be drawn on them but at four months, as they could not receive the funds for a month, when the remittance to them would be in sixty days sight bills; and that they would accept such a draft, and see that the money was obtained. This proposition was acceded to by the plaintiffs, who received the acceptance of the Phillips for the amount. The draft was not paid at maturity, nor has it been paid since; but the evidence shows that when the Phillips accepted plaintiffs' draft, they were enjoying unbounded credit in the United States and in Europe, and that they maintained their credit until March, 1837.

It appears to us that the defendants cannot be made liable to the plaintiffs, between whom and them there is no privity of contract. It is clear that although the plaintiffs knew that the articles were for the use of the defendants, they looked to R. & J. Phillips for payment, and trusted to them exclusively; advising them that they had been debited for the amount of the articles delivered, they negotiated with them to obtain their acceptance; and even when this acceptance was protested, they do not appear to have looked to the defendants as in any way liable to them. They give them no notice that they were unpaid for the goods forwarded, and only brought the present suit fifteen months afterwards, when they had lost all hopes of being paid by R. & J. Phillips, and when the defendants had settled with M. de Lizardi & Co., the only agents whom they acknowledge. The Lizardis acted towards the Phillips as principals, not as the agents of the defendants, and one of the Phillips has declared that R. & J. Phillips considered themselves as the agents of the house of Lizardi of New Orleans, and not of defendants, with whom they never communicated. Even if under the circumstances of this case, there ever existed any liability on the part of the defendants towards the New Castle Manufacturing Company, it appears to us that the course pursued by the latter has

entirely discharged them. 7 Martin, N. S., 24.* Upon the ground of general convenience and the usage of trade, says Story in his treatise on Agency, the rule has obtained that agents or factors, acting for merchants resident in a foreign country, are held personally liable upon all contracts made by them for their employers; and this without any distinction whether they describe themselves as agents or not in the contract. In such cases it is presumed that the credit is given to the agents or factors; and the ordinary presumption is not only that credit is given to the agents, but that it is exclusively given to them, to the exoneration of their employers. Still, however, this presumption is liable to be rebutted, either by proof that credit was given to both principal and agent, or to the principal only. Story on Agency, sec. 269. In this case the whole evidence shows that credit was exclusively given to the agents, admitting that R. & J. Phillips can possibly be viewed as the agents of the defendants.

Judgment affirmed.

SPENCER GRIFFIN, Tutor, *v.* WILLIAM WATERS.

In an action for the partition of the property of a succession, no claim can be allowed by the appellate court, which was not made before the court of probates, nor decided on by that tribunal.

Where the community has been dissolved by the death of the husband or wife, the survivor, with the heirs of the community, become co-proprietors of the estate; and where the surviving partner retains possession he becomes the *negotiorum gestor* of the heirs.

THIS was an action before the Court of Probates for the parish of Rapides, by the plaintiff as tutor of William and David Stokes, against Waters as surviving partner of the community formerly

* In this case (*Williams et al.* v. *Winchester*) it was decided that 'when goods are sold to an agent for an unknown principal, the latter will be liable when discovered, although no enquiry was made of the vendor, unless the latter let the day of payment go by, without making a demand on the principal, who afterwards pays the agent.' Citing 1 Campbell, N. P., 95. 4 Taunton, 576. n. 15 East. 65. 2 Livermore, 199, 200.

existing between himself and his wife, and as tutor of Thomas Waters, their only child. There was a judgment, *Johnston*, J., homologating the partition made by the notary, and against the defendant for the sum of nine thousand four hundred and fifty four dollars, thirty eight cents, to be equally divided between the minors represented by the plaintiff.

Lewis and *Bryce*, for the plaintiff.

Dunbar and *Hyams*, for the appellee.

GARLAND, J.* This action was commenced for the purpose of enforcing a settlement and partition of the estate in community between the defendant and his deceased wife, the mother of the minors. The defendant, in the month of April, 1828, married Elizabeth Stokes, a widow, having two children, without any marriage contract; they lived together until July 10th, 1833, when she died, leaving one child, who is represented by his father, the defendant. Various inventories of the estate were made in the months of February, April, June, and August, 1835. In the month of June, in that year, the defendant prayed for the convocation of a family meeting to decide upon the terms upon which the property should be sold, he having ever since the decease of his wife had it in possession administering it, without authority, or making any inventory other than those mentioned as having been made in February, and April, 1835. These various inventories amounted to $52,412, but this sum is to be reduced by re-appraisements very considerably. No full inventory was ever made of the debts owing to the estate, and it is very difficult to ascertain their amount with any exactness. The property composing the succession was sold in August, 1835, at public auction, and purchased by the defendant for $41,022, and the estimate of the debts and money received, made by the probate judge, increased that sum to $76,117 52, from which the debts paid by defendant, the value of a slave brought into the community, and some other items were deducted, leaving a balance of $25,363 14, as forming the community. One half of this sum was assigned to the defendant, and the remaining half, with the addition of $1500 received by defendant from the

* By agreement with the counsel engaged in this case, the opinion of the court was prepared after the return of the judges from the Western District; and was delivered in New Orleans, the 31st of January, 1842.

estate of his wife, amounting to $14,181 57, was decreed to be divided between the two minors represented by Spencer Griffin, and their half-brother, represented by the defendant and his under tutor, making the sum of $4727 19 due to each. From this judgment the defendant has appealed, and in this court the plaintiff prays for an amendment of the judgment in his favor.

The record is voluminous, the testimony uncertain, and confused in some respects, and the accounts so generally and loosely kept, that it is impossible to approach to accuracy in coming to any conclusion.

The evidence shows that the defendant came from Kentucky in the latter part of the year, 1824, with a flat-boat load of western produce. What the value of this cargo was we cannot ascertain, but it appears that he had a partner (Wright) in the adventure, with an interest of a third, who says he put in between five and seven hundred dollars to purchase it. What this cargo was sold for, does not appear, but the witnesses say at a handsome profit. When the defendant left Kentucky, it is shown he was in very embarrassed circumstances, if not altogether insolvent. With the proceeds of their cargo of produce, the defendant and Wright purchased a steamboat called the Natchitoches, and by running her in the Red River trade, it is said, made a great deal of money, but what particular sum is not shown. With the funds raised in this manner, the defendant and Wright purchased successively, the steamers Florence and Miama, and with them, it is also in evidence, that they made much money, but no specific sum is proved, nor does it appear what became of the boats. In the spring or summer of 1827, the defendant purchased the steamer Dolphin for $8000 in partnership with Wright; and others, at different times, had an interest in her also. Wilson at one time owned a half; Soher, Goodman & Co., one sixteenth; the defendant then purchased the whole boat except Wright's portion, and again sold half of her for $4000. Several witnesses swear that in the course of the summer and autumn of 1827 this boat made $6000 in the Red River trade. In the winter of 1827-8, the defendant ran the boat in the Ouachita trade, and there several witnesses say she made $8000, but what portion of these sums belonged to the defendant is not shown, as there has not been any settlement of the partnership accounts exhibited to us, and Wright

says they had not been settled with him when he testified in this case in 1836. The marriage took place in April, 1828, whilst the Dolphin was engaged in the Ouachita trade, and some time before she left it for the season. So that a portion of what she made belonged to the community, but how much we cannot tell.

It is further established that at the time of the marriage the defendant had several slaves; but it is also proved that all of them died but one, who ran away; and none of them are mentioned on the inventory, so that it is unnecessary to remark further about them, than to say that whatever profits were made by them after the marriage belonged to the community. The evidence also shows that the defendant was concerned for some months in a produce store at Natchitoches, with McGuire, who says they did a good business, but how much was made does not appear with any certainty. He was also a partner with Culbertson in a store at Alexandria, in which his interest is shown by the books and evidence to have been $2750, which the probate judge allows and the plaintiff does not contest.

As before stated, the defendant appears to have left Kentucky much embarrassed. He was two thirds owner of a flat-boat cargo, costing, according to Wright's testimony, between fifteen and twenty one hundred dollars; he had several children in Kentucky to support and educate, he paid off some of his old debts, and invested the proceeds of his first adventure in a small steamboat, which although profitable must have been entirely lost from accident or decay; another was then purchased, a third, and a fourth, by all of which he is proved to have made money, but the amount is left indefinite. The defendant's counsel insists that he was worth at the time of his marriage $23,814 71, which was accumulated by his own industry and energies in about four years and three months on small steamboats, in partnership all the time with Wright, and at different times with other individuals. We cannot upon evidence so uncertain as that before us, admit that the claim is established, when it appears that so large a portion of the profits made were withdrawn, and invested in slaves, who afterwards died or ran away. This view of the case is confirmed by the evidence of Wright, who says that his partnership with the defendant was dissolved in 1829, the year after his marriage; that he then offered to

take $3000 for his third of what had been made, which defendant refused to give, but offered him $1800, and an acquittance for about $950, which Wright had withdrawn during the partnership. Their accounts consequently were not settled when the witness testified, although seven years or more had elapsed since the dissolution of the partnership. Taking then this offer of the defendant as a criterion of what the partnership with Wright was worth, it would seem that his share was worth about $5500, which was represented by seven slaves, proved to be valuable, and by his interest in the steamboat Cincinnati, which it appears did not turn out a profitable investment, although at the time of this dissolution, the heaviest losses by her had not been realized. Shriver says in his testimony that besides this property, defendant, at the time of his marriage, had considerable sums of money due him on Red River for freight and produce, and was according to *his estimate probably* worth $20,000, but it is not shown what portion, if any, of these debts were collected and went into the community.

All the property placed on the inventories is stated to belong to the community, without reservation or exception, and the law presumes it to be so; therefore all claims upon it must be established with sufficient certainty to enable a court to ascertain the amount with precision, or something approaching it.

In the summer after his marriage, the defendant went to Kentucky, and there built or purchased the steamer Cincinnati, in which Wright was a partner, by which operation he lost a considerable sum, in consequence of the failure of Soher, Goodman & Co. who purchased an interest in her; he also lost several slaves by the boat remaining in New Orleans for some time, when the yellow fever was prevailing. After this, the defendant owned the steamer Republican, which it seems he sold in a short time, and made very little by. He then purchased the steamer Planet, and sometime after the steamers Lioness, Gleaner, and Rapides, the two former were lost by accident, before having made much money, but the latter proved a very profitable concern. The gross amount earned the first season is shown to have been upwards of $51,000, and the profits large. The second year the boat did a very fine business, but not so much as the year she commenced running. The probate judge has said the community to the time of the death of his

wife, made by the steamers Rapides, Planet, and Gleaner, the sum of $19,360, and by the Lioness previous to her loss, $4521. In these results the evidence has not satisfied us that the judge erred.

The defendant and others then formed a company called the Red River Steamboat Line, of which the capital was $48,000; the boats were the Rapides, Caspian, and Lioness. The interest of defendant was one half, but the latter boat was lost in the month of May, 1833, after earning only $4521, as before stated; the Caspian made $5562 42, up to the time of his wife's death; and the profits of the Rapides are included in the sum of $19,360, herein mentioned.

During the existence of the community the defendant purchased a tract of land of upwards of one thousand acres, on Red River, above Alexandria; and a number of slaves were on it, at the time that his wife died. The inventory shows the names of eighteen as belonging to the community, and two had died in 1834, before the inventory was made. After the death of his wife, on the 10th of July, 1833, the defendant kept possession of all the property, land, slaves, the steamers Rapides and Caspian, and all the debts due the community; he made no inventory until the month of February, 1835, when a partial one was made; a second was made in April, a third in June, and a fourth in August of the same year. Then the plantation and all the improvements were said to belong to the community as before stated. In January, 1834, the defendant and Beamon purchased in partnership a plantation below Alexandria, when the former took all the community negroes off the community plantation, and put them on the plantation with Beamon; and in March afterwards, without any authority, he sold to Lambeth one half of the community tract of land for $7500, in consideration of a half interest in a large number of slaves, which Lambeth had sold him. Between them a partnership was formed, the community property was entirely separated and broken up, and a large plantation commenced for the benefit of the defendant and his partner. The community negroes were, in the early part of 1835, brought back to the common plantation, and the sum of $1500 allowed, in a settlement between Waters and Beamon, for their hire for the space of eleven months. During that time one valuable slave was accidentally killed, another died, and the defen-

dant now wishes to charge the community $5000 for the hire of the slaves of the partnership during the time they were on the land belonging to the community, and $14,000 for improvements made thereon, thereby reducing the whole value of the land to $6600, when the defendant had sold one half to Lambeth for $7500, before the improvements were made.

After the partition was made by the parish judge, acting as a notary, the plaintiff presented it to the probate court, praying for its homologation, with certain amendments.

1. That the community should be declared to be worth $100,000, as established by the evidence. This is not proved to our satisfaction. It is true, two witnesses testify that the defendant, at different times subsequent to the death of his wife, said that he was worth $100,000, but from the manner of those conversations, we think more reliance is to be placed on the evidence of Doty, who was the confidential clerk of defendant, and who says he believes that he knew more of defendant's affairs than he did himself. He says that defendant, at the time of the death of his wife, was worth between twenty and thirty thousand dollars. From the expressions used, we think the witness meant that the community was worth that sum, although he speaks of the defendant. In this view he is sustained by the probate judge, who has fixed the amount very nearly at the mean between those sums.

2. The plaintiff alleges that since the partition was made, the insurance on the steamboats Lioness and Gleaner, amounting to about $20,000, has been received by defendant, and that there was other property, particularly a pine wood's residence, which had not been divided. There is no evidence in the record to sustain these allegations; the probate judge therefore did not send the partition back to the notary, or decide on the application. In this, we think, he was correct. If the money has been received and the property exists, it may be hereafter divided according to the rights of the parties.

3. It is prayed that the partition be amended by charging the defendant with $3000, funds of the community, which he used to pay his separate debts. There is no satisfactory evidence in support of this allegation in the record.

4. It is urged that the community was enriched to the amount of

$25,000, by its interest in the Red River Steamboat Line, which defendant has not accounted for. Of this there is no sufficient evidence, and the judge did not err in rejecting it.

On the argument of the cause in this court, the counsel for the plaintiff insisted that the defendant ought to account for the sum of $4000, the difference between the first and third appraisement of one half the steamer Caspian. When first appraised, her value, in July, 1833, was stated in the inventory at $9000; when last estimated, in 1835, it was reduced to $5000. The plaintiff says that the defendant ought to account for this difference, or for what the boat made during those two years. What our opinion on the question may be, it is not necessary to state, as the claim was not made in the probate court, nor decided on by that tribunal. Code Pr., arts. 1029, 1030, 1031, 1032.

The first ground of objection filed by the defendant to the homologation of the partition, is, that the community was insolvent after the payment of its debts, and restoring to him the amount brought into the marriage. This objection covers a broad ground. We have recapitulated the evidence as much in detail as we could. To go into an argument upon it, is unnecessary. We do not think the community was insolvent, and are of opinion that the probate judge fixed the amount with as much correctness, as it could be ascertained by the testimony.

The second ground is, that there should have been deducted from the sum of $19,360, the amount due the steamers Rapides, Planet, and Gleaner, the sum of $12,000, for bad debts, expenses of collection, and other charges. Upon this objection we must first remark that the defendant has all the evidence of those claims in his possession, and has not shown, by testimony, any such extraordinary losses by bad debts or heavy expenses. We cannot say that the probate judge erred in overruling the objection.

The third objection is, that the sum of $25,000 should be allowed defendant, as the amount brought by him into the community. After a full examination of the grounds on which this objection rests, we are satisfied that there is no error in the judgment of the probate court upon it.

The fourth objection is, that the defendant should have been allowed the sum of $20,000 for the hire of slaves, and for improve-

ments made at his expense, since the death of his wife, on the plantation above Alexandria belonging to the community.

In addition to the facts already stated in relation to the removal of the community slaves from the land, and the possession by the defendant of all the property composing the succession, and the sale of one half to Lambeth, it further appears that he had a large amount of debts to collect; that he kept possession of the steamer Caspian for more than two years, running her in the Red River trade; it is proved she was a favorite boat with the public, and made a considerable sum of money. The profits made during these two years are not accounted for, and as the defendant contends that he was the co-proprietor and agent of the minors, who, for a long time after their mother's death, had no other representative than himself, we will presume that he acted honestly, and applied the profits of one portion of the common property to the improvement of the other. That the defendant supposed the plantation, and all the improvements, belonged to himself and to the heirs of his deceased wife, is shown by the inventory and probate sale. In both it is expressly called community property, and the defendant signs the acts containing the admission. The evidence is not very definite as to the value of the improvements, and the estimates of some of the witnesses seem extravagant. A cotton gin was put up, which it is proved cost about $2000; several large ditches were dug, and a number of a smaller kind. Other improvements, such as erecting buildings, clearing land, and making fences are proved. One of the witnesses estimates the improvements as giving an additional value to the land of $20,000; others estimate them at much less. Before the improvements were put on the plantation, the defendant had sold one half the land for $7500, which shows the whole was worth $15,000; in 1834 and 1835, it is shown that land increased rapidly in value; and that in August, 1835, the whole plantation and improvements sold for $25,600, on a long credit. The improvements could not then be worth more than $10,600, yet the defendant claims $20,000 of these minors, whose interest was only two-sixths of the whole, seeming never to have remembered that he was responsible for any part.

The counsel for the defendant urge that the community was dis-

solved by the death of the wife, in July, 1833, and that after that period, he and the minors were the co-proprietors of the estate. That is certainly true. 9 La. 583. They further say that the defendant was the *negotiorum gestor* of the minors, and rely upon the decision of this court in the case of *Broussard* v. *Bernard et al.* 7 La., 216. This is admitted. They then say that according to the decision in the case of *Percy* v. *Millaudon*, 6 Martin, N. S., 616, and the article 2278 of the Code, the defendant is entitled to compensation for the improvements put upon the property. We think there is an obvious distinction between the case of *Percy* v. *Millaudon*, and this. Percy and Millaudon were joint owners of an estate, both majors, and present. Millaudon went on to make extensive improvements, Percy stood by making no opposition, and afterwards refused to pay his portion of the expense. This court very properly held that he should pay. Compare the facts in this case with that relied on, and the distinction is plain. Here two of the co-proprietors are minors, incapable of acting, the defendant takes possession of their property, has no one appointed to represent them, makes no inventory for nearly two years, removes the slaves, sells a portion of the land, collects the debts, employs the steamboats in a profitable business, and renders no account of what is made, and then claims indemnity under a law, which says, 'equity obliges a proprietor whose business has been well managed, to comply with the engagements contracted by the manager in his name; to indemnify the manager for all personal engagements he has contracted; and to reimburse him all useful and necessary expenses.' We are clearly of opinion that the defendant does not bring himself within the provisions of the law he relies on.

The fifth objection is, that the defendant should have been allowed $10,000, for interest paid by him on the community debts, and for expenses in collecting the debts due to it. The evidence does not sustain this claim. The defendant had all the community property to pay the debts with; if he has not disposed of it in the manner provided by law to pay those debts, it is his own fault. The mode of administering the estate according to law is plain; the defendant did not adopt it, and he must take the consequences.

The sixth objection is, that there should have been a deduction of $5000 made from the sum of $10,083 42, the amount due to

the steamers Lioness and Caspian, for bad debts, and for the expenses of collection. We see no sufficient ground for such a deduction. The record does not show any such amount of bad debts, or that the expenses of collection were so great.

The seventh and last objection is, that a deduction of $10,000 should have been made from the debts due to the community, for off-sets or claims on the part of the debtors. We find nothing in the testimony that sustains the claim, and the probate judge was right in rejecting it.

Judgment affirmed.

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JOSEPH GILLARD and others, Heirs, &c., v. SAMUEL GLENN, and others.

Actual possession of part of a tract of land, with title to the whole, is possession of the whole; but the party alleging such possession must show fixed and certain boundaries to the tract, the whole of which he claims by establishing actual possession of a part, otherwise possession of a few acres might be extended to any number, according to the interest of the party.

THIS action was instituted by the heirs of Joseph Gillard, and the heirs of Mary Magdelaine La Cour, and Nicholas La Cour, against Samuel Glenn, Sarah Duncan, and James McWilliams, before the District Court of Rapides, the 19th of October, 1839. A judgment was entered, by consent, against McWilliams; and the jury having found for the defendants, Glenn and Duncan, judgment was rendered by *Wilson*, J., quieting them in their possession.

Elgee, for the plaintiffs.

Thomas and *Dunbar*, for the appellants.

GARLAND, J.* The plaintiffs allege, that for more than a year they had, in common, enjoyed, and held peaceable and uninterrupted possession of a tract of land of twenty *arpens* front, by the ordinary depth, on Red River, and also the upper part of a league

*By agreement with the counsel engaged in this case, the opinion of the court was prepared after the return of the Judges from the Western District; and was delivered in New Orleans, the 31st of January, 1842.

square of land on the same stream, when the defendants entered upon the same, and forcibly and clandestinely took possession of small parcels thereof, within a year, and continue to hold possession, thereby disturbing them in the use and enjoyment of their property, to their great damage. They therefore pray that the defendants be condemned to surrender the possession of all the land they hold or have taken actual possession of, within the year preceding the institution of this suit.

To this petition, Glenn answered, that he and those under whom he claims had been in quiet and peaceable possession of the premises for more than twenty years; that Isaac Thomas was his vendor, and bound to warrant him in his possession; he prays that Thomas be cited, and that he have judgment against the plaintiffs; but should they succeed against him, he asks for judgment against Thomas. He also denies the plaintiffs' allegations generally.

The defendant, Duncan, denies the allegations of the plaintiffs; avers that she had been in actual possession and residing on the place more than one year previous to the institution of the suit; says she is the tenant of Isaac Thomas, and calls upon him to defend her in her possession, and prays for judgment against the plaintiffs. No answer was filed by McWilliams, and subsequently a judgment by consent was rendered against him, without costs.

The plaintiffs excepted to the answers of Glenn and Duncan, calling Thomas in warranty, which exception being sustained, Thomas immediately appeared, and prayed to intervene in the suit, alleging that he was the vendor of Glenn, and the lessor of Duncan; that they were in possession under him, and that he was bound to defend them. He further says that he has a valid title to the land sold to and claimed of Glenn, and also to that claimed of defendant, Duncan; he therefore prays to be permitted to appear and defend the cause in their stead. He then proceeds to deny generally, the demand of the plaintiffs, and says that he and his vendee, and tenant for him, have for more than one year been in quiet and uninterrupted possession of the land claimed, and for a longer period, in good faith; wherefore he says, neither he nor his vendee, nor tenant can be legally disturbed in their possession; he therefore prays for a judgment in his favor. Sub-

sequently, he filed an amended answer, in which the prescription of one year is specially pleaded to the plaintiffs' demand.

The parties went to trial on these pleadings. The plaintiffs showed that they were in actual possession, and that they lived on, and cultivated the front part of the lands claimed by them; which they show are held under the same titles set up by them in the case of *Maes* v. *Gillard's heirs*, which was decided by this court and reported in 7 Martin N. S. 314. They claim in conformity to the judgment rendered in that case, and exhibit it, and their titles, to show the character and extent of their possession. It does not appear that any actual survey, according to the judgment of this court, was made by the plaintiffs, previous to the defendants taking possession of the land claimed, or for some five or six months afterwards, when the interference was distinctly shown; and it is not pretended that the plaintiffs had any other possession of the places in dispute, than that of being the owners of a large tract which included them, the boundaries of which were not at the time specifically fixed.

On the part of the defendants, it is established by the evidence of several witnesses, stating what they had seen, and by other circumstances, which go to fix the period, that Isaac Thomas claiming to be the owner of a tract of forty *arpens* front on each side of the Bayou Taureau, by the ordinary depth; about the 8th of September in the year 1828, went to the place with a United States surveyor, acting, as is stated, under the authority of the surveyor general of the United States, and proceeded to mark the lines, establish the corners, and locate the claim. Glenn, one of the defendants, was present, and Thomas having sold him four hundred *arpens* of the land, put him in possession of that quantity on the lower line, by marking it off to him. Glenn, early in October went on the place again, with negroes, and began to improve it by building cabins and clearing land. He shortly after removed his family to the place, and it is shown, that in 1829, he had twenty five or thirty acres in cultivation near the lower corner on the back line. His possession was open and notorious, and he remained in possession for a long time subsequent to the commencement of this action.

As to Sarah Duncan, the other defendant, it is in evidence that

her son was with Thomas and the United States surveyor, when the survey was made in September, 1828, and that on that day, when the corner on the upper line was established, he, Thomas, put the young man in possession for his mother, at an old Indian clearing. The next day he began to prepare the materials to build a cabin, and in two weeks after the family was residing in it, and in 1829, had some six or eight acres enclosed, and in cultivation; and he continued so to reside and cultivate, until after the institution of this suit. One Pamphlin also leased another portion of the land from Thomas, lying on each side of the Bayou Taureau, but as she is no party to this suit, it is not necessary to notice the fact, further, than as it proves an intention to take possession of all the land within the limits marked out by the surveyor.

It is further to be remarked, that when Thomas made this survey, and took possession as stated, the case of *Maes* v. *Gillard's heirs*, was still pending in the supreme court, with a judgment of the district court against the defendants, now plaintiffs, both on the questions of title and possession, which case was not decided in favor of the present plaintiffs until about a month or six weeks afterwards. The boundaries of the plaintiffs were therefore unsettled, and the decision of the case with *Maes* changed them materially.

There was a verdict and judgment for the defendants, from which the plaintiffs have appealed.

We have given a large share of our attention to this case, and after mature reflection we are of opinion that the plea of prescription must prevail.

In the first place, it is necessary to attend to the prayer of the plaintiffs' petition. It is, that they recover possession of all the land which the defendants have taken actual possession of, within the year preceding the institution of this suit. This looks like an indirect admission that some had been taken possession of more than one year previously, and at most it only asks for what was in actual possession, which quantity has not been shown. The plaintiffs have not therefore made their demand certain as to the quantity taken possession of within the year, nor does it appear they were in possession by any definite boundaries for more than

one year previous to the institution of their suit. 10 La. 465. Code of Pract. art. 49. When a party alleges possession of a large tract of land, and shows actual possession of a part only, as evidence of his right to the possession of the whole, he must show specific and fixed limits and boundaries, otherwise an actual possession of ten arcres might be made to extend to one hundred, or one hundred thousand, as it suited the interest of the party. Actual possession of a part, with title to the whole, is no doubt possession of the whole, but there must be some fixed limits to the whole tract claimed. Civ. Code art. 3400. 7 La. 256.

In September, 1828, it is certain that the plaintiffs were not in possession by any ascertained boundaries or particular limits. Their suit with *Maes* was still pending, and according to the pleadings in that case, he was in possession and suing for a disturbance and slander of title.

From the evidence before us, we cannot doubt that Thomas made his survey in the month of September, 1828, and at that time put Glenn and Duncan in possession of the places they afterwards occupied; and that they took actual possession more than one year previous to the 19th of October, 1829, when the petition in this action was filed. The testimony of Meade, McWilliams, Blundel, Kilpatrick, and the notice in the Alexandria newspaper, show it conclusively.

The counsel for the plaintiffs, who argued this cause with much force and ingenuity, insisted strongly that the plaintiffs had also a civil possession, which conflicted with the possession of defendants, and that no prescription could run. In reply to this, we must refer to what has been previously said, as to the uncertain extent of plaintiffs' possession, if they ever had any, previous to their judgment against *Maes;* and further say, that the gist of the plaintiffs demand is that they have been disturbed in their possession, or actually put out of it. The question then is, when did this ouster or disturbance take place? We have no doubt it commenced more than one year previous to the commencement of this suit. Civ. Code art. 3412. Code Pract. art. 49. 1 Martin N. S. 17. 3 Id. 117.

Judgment affirmed.

In the cases of *Gilbert McKeckney* v. *René Perot*, and *Paul Tulane and another* v. *Charles E. Greneaux and another*, from the District Court of Natchitoches, and of *Bernard Hemken* v. *Thomas Wafer*, from the District Court of Claiborne, the judgments of the lower courts were affirmed, at this term, with damages for frivolous appeals.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

EASTERN DISTRICT, AT NEW ORLEANS,
COMMENCING, NOVEMBER, 1841.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. RICE GARLAND.

ALEXANDER MCCORMICK *v.* JAMES W. BROADWELL.

The return of service of a summons to attend a meeting of the creditors of an insolvent who has surrendered his property, should be made by the sheriff as in the case of an ordinary citation; but where, by the neglect of the latter, no return has been made, third persons will not be allowed to suffer, but a return will be ordered to be made *nunc pro tunc*.

After a stay of proceedings no judicial process can be issued at the suit of any creditor placed on the schedule of the insolvent and notified of the failure, either against such insolvent, or his bail.

APPEAL from the District Court of the First District, *Watts*, J.

Preston, for the plaintiff and appellant, urged that he was not a party to the surrender of the defendant, and therefore not bound by the proceedings.

Roselius, for the appellee.

MORPHY, J. The plaintiff is appellant from a judgment dis-

charging a rule taken on Adams, Buckner & Co., to make them liable on a bail bond as the sureties of defendant, on a return of *non est inventus* to a writ of *capias ad satisfaciendum* issued against the latter. The defence made below and renewed here, is, that shortly after the judgment obtained by plaintiff, his debtor made a *cessio bonorum* before the parish court, and obtained from that tribunal a stay of proceedings against his person and property; that a meeting of the creditors of said Broadwell was called, and as none of them appeared, although duly notified, the parish court, on a certificate of the notary that no creditors had met, appointed the sheriff as syndic; that plaintiff was a party to these proceedings; that they have never been set aside, and have acquired the force of *res judicata*. This defence was accompanied by an offer to surrender the body of the debtor.

The record shows that on the first of August, 1835, after the judgment obtained by plaintiff against Broadwell, but before the return of a *fi. fa.* which had issued under it, the defendant filed his schedule in the parish court. This surrender was accepted by the judge, who ordered a meeting of the creditors to be held before W. Y. Lewis, on the 12th of August, and granted a stay of proceedings. Upon a suggestion that this meeting had not taken place, another was ordered for the 30th of September; and that having also failed, a third was convened for the 16th of November following, and on a certificate of the notary that no creditors had met, the sheriff was appointed syndic. There is no evidence before us that McCormick was summoned to attend the meetings that were to take place under these two last orders; but from the testimony of E. Murphy, a witness produced by the plaintiff, and who at that time was employed in the sheriff's office, it appears that plaintiff, who was placed on the schedule filed by defendant, was personally served with a summons to attend the first meeting of the 12th of August. The evidence of this service should have resulted from a regular return by the sheriff, as in cases of ordinary citations; but that officer appears to have been in the habit of making no returns of the summons served by him on the creditors in cases of insolvency. The judge below was, in our opinion, correct in deciding that the bail should not suffer by this neglect of the sheriff, and in admitting the latter to make his return *nunc pro tunc*. *Ni-*

cholls v. *De Ende.* 3 Martin, N. S., 310. *Aubert* v. *Buhler et al.* Ib., 489.

The writ of *capias ad satisfaciendum*, upon the return of which the present rule was taken, issued on the 13th of August, 1835, when plaintiff had been made a party to the proceedings in the parish court. After the stay of proceedings no judicial process could lawfully issue at the suit of any of the creditors placed on the defendant's schedule, and notified of the failure. 5 Martin, N. S., 124. 4 Ib., 625. Until set aside, the stay of proceedings was a bar to any further action on the part of plaintiff against his debtor, or his bail.

Judgment affirmed.

WILLIAM ARMSTRONG *v.* JAMES MOONEY.

In a redhibitory action for the rescission of the sale of a slave, an offer to return the slave is sufficient, if rejected, without an actual tender.

ACTION before the Parish Court of New Orleans, *Maurian, J.* The plaintiff prayed for the rescission of the sale of a slave, and for the repayment, with interest, of six hundred dollars, the price which he had paid the defendant, and for one hundred dollars damages. The defendant pleaded a general denial, and the want of tender. The vendor warranted the slave, 'free from the vices and maladies prescribed by law.'

On the trial, Lambert, a physician, testified that the slave had been afflicted with a chronic inflammation of the neck of the uterus, which appeared to have existed four or five months; and that the treatment of this disease requires complete repose, in most cases for a year; that the disease, if properly managed may generally be cured, but that it sometimes resists the most skillful practice, and terminates fatally. That during the treatment, the slave would be incapable of rendering the least service to her master, as it would be necessary that she should remain the whole time on her back. That the slave in question might be put to work, but that any thing of the sort would increase her complaint. He further testified that the cure of this disease was very difficult in

slaves, owing to their neglect or inability to submit to the necessary treatment. Out of a great number whom he had visited, he knew of but one case of cure well established. He stated that the expense of the cure would be from one hundred and fifty to two hundred dollars; and considered that the disease diminished her value at least one third. Moreau, a midwife, confirmed the testimony of Lambert. Monsceaux, proved that the slave was diseased before the sale by the defendant. The testimony of Preaux is stated substantially in the opinion of the court. The bill of sale from Mooney to the plaintiff was produced on the trial.

The court below decided that the facts presented a proper case for the exercise of the discretion vested in the judge, in redhibitory actions, by art. 2521 of the Civil Code, to decree only a reduction of the price; and that the value of the slave was proved to be diminished one third, by the disease with which she was afflicted. He accordingly gave a judgment in favor of the plaintiff, for two hundred dollars, as one third of her value.

Preaux, for the plaintiff.

Roselius, for the defendant and appellant.

MARTIN, J. The defendant is appellant from a judgment in a redhibitory action, and has built his hope of relief at our hands, on an allegation of the absence of any proof of the tender of the slave before the action was brought. The record shows that Preaux deposed, that when the plaintiff came to his office to institute this suit, he instructed him to make a tender of the slave to the defendant; that afterwards, they met the defendant and made him a tender of the slave, which he refused to take back, saying, sue me if you think yourself right.

This case is not to be distinguished from that of *Bowman* v. *Ware*, 18 La. 597, in which we held that, "in a redhibitory action for the rescission of the sale and refunding the price, an offer to return the slaves is sufficient if it be rejected, as there is then no necessity of making an actual tender."

Judgment affirmed.

Edward Salzman v. His Creditors.

Where on an application by an insolvent for a discharge from custody under the act of 25th March, 1808, the circumstances of the case induce the belief that the applicant, who was a merchant, had kept books or accounts which he has not surrendered, and no good reason is shown for not producing them, his petition will be rejected.

Harriet Wooster is appellant from a judgment of the District Court for the first District, *Buchanan*, J., discharging the insolvent from imprisonment on the condition of his executing an assignment of the property in his schedule, to her in trust for his creditors. In the affidavit annexed to the petition of the insolvent, he swears, that 'the schedule filed by him contains, to the best of his knowledge and remembrance, a full, true, and perfect discovery of all the estate, goods, and effects to him in any way belonging, and of such debts as are due to him, or to any person in trust for him, and of all securities and interests whereby any money may hereafter become payable, or any benefit or advantage accrue to him, or to his use, or to any person or persons in trust for him; and that he has no lands, money, stock, or other estate, real and personal, reversion or expectancy, beside what is set forth in his schedule; and that he has not directly or indirectly sold, or otherwise disposed of in truts, or concealed any part of his lands, moneys, goods, stocks, debts, securities, contracts, or estates, whereby to secure the same, or to receive as expert any profit or advantage therefrom, or to defraud or deceive any creditor to whom he was in any wise indebted.' The testimony on the trial of the rule, taken by the appellant on the insolvent, to show cause why the order granting a stay of proceedings, and ordering a meeting of his creditors should not be rescinded, is stated in the opinion of the court.

J. W. Smith, for the appellant, praying for a reversal of the judgment, submitted the case on the following points: 1. The insufficiency of the affidavit. The insolvent only swearing to the best of his knowledge and belief. Act of 1808, sec. 2, 1 Moreau's Dig. 567. 2. The failure of petitioner, though a merchant, to deposit either his books or accounts in the office of the clerk. Act of 1808, sec. 2, above cited.

GARLAND, J. The plaintiff being in custody of the sheriff of the parish of Orleans, at the suit of the opponent, applied for the benefit of the act of the 25th of March, 1808, and of the acts amendatory and supplementary thereto, for the relief of debtors in actual custody. In his petition, he does not allege that he has sustained any losses or been unfortunate in business, but that before he was able to provide for the expenses of his family a suit was brought against him, and he was thereby prevented from exercising his industry and attention to business. He therefore annexes his schedule, says he has kept no 'books of account,' and asks for a meeting of his creditors and a discharge. The property on the schedule is much less than the amount of debts stated. Among the creditors the opponent is mentioned as one for $1750, due for board. She made opposition to his discharge.

I. Because the affidavit at the foot of the petition is insufficient and irregular.

II. Because the insolvent is a merchant or trader, and has not deposited in court either his books or accounts.

III. Because the schedule is insufficient and irregular.

The first and third grounds of objection present no serious cause why the petitioner should not be discharged from custody. The affidavit is in the language prescribed by the statute, and the schedule substantially complies with its provisions.

The second objection is more serious, and we think decisive of the claims of the petitioner. The evidence shows that he and a man named Bleker, entered into a partnership *in commendam*, by which the former was to transact business in New Orleans, under the name of Salzman & Co., and the other in St. Louis, or some other place in the western states, in the name of W. H. Bleker & Co. What capital was invested, is not shown or stated; but the parties were not to be bound for each other, for more than five thousand dollars. By the contract of partnership, *just and true books of accounts were to be kept in each establishment, in which all the transactions of each house were to be duly and faithfully recorded and entered from day to day*; on the last day of each month a balance sheet was to be made out, and exchanged between the partners, and the profits duly credited; the business according to the contract, was to be conducted upon strict mercantile principles.

The operations of the firm commenced on the 25th of February, 1839, and the application for relief was filed on the 11th of May following. In the petition it is stated that no books were provided. A witness states that he was in the same office with Salzman, and never saw any commercial books kept by him; that he did very little business, and that it did not require a set of books; but two consignments were received, and they were disposed of very soon. On the other side, it it shown by the schedule that Salzman had counting house furniture valued at $500; that he had an office or counting room; and among his creditors we see the name of a well known stationer in this city, and a statement, that the debt due, was for stationary. By the terms of the act of partnership Salzman was bound to keep true and correct books. As a general principle well known among commercial men, it was his duty to have kept them, and the law under which relief is sought requires the books and accounts to be surrendered. 1 Moreau's Dig. 56–7.

It is very remarkable, that the petitioner should have supplied himself with so many necessaries and conveniences in his counting room, and have omitted one so essential as a set of books, or one book at least.

The omission of a merchant or trader to keep his accounts and stransactions in books that can be examined when necessary, is a very suspicious circumstance at all times, and peculiarly so in this case, in which a discharge is asked from a debt owing for the food and support of the petitioner and his family.

All the circumstances of this case induce us to believe that the petitioner had some books or accounts, which he has not surrendered, notwithstanding the witness says he never saw them, which is possibly true; and as he has shown no reason to excuse the non-production of them, we think the district judge erred in overruling the opposition, and discharging the petitioner. 18 La. 495.

The judgment of the district court is therefore reversed, the opposition sustained, and the application of the petitioner rejected with costs.

HENRY JACKSON *v.* The Heirs of HENRY DUNBAR BRIDGES.

In a suit for freedom by a person of color held as a slave in good faith and under a just title, proof that he had served as a seaman in a ship of war belonging to the United States for several years, that he had always passed for a free person, and that none other were ever received on such vessels, will not be sufficient; he must establish his freedom by positive proof.

APPEAL from the Parish Court for the parish of New Orleans, *Maurian*, J.

Roselius, for the defendants and appellees.

J. W. Smith, for Howell and Johnson, cited in warranty.

MORPHY, J. The petitioner, a person of color, has brought this suit to assert his freedom, and for damages against the defendants, who, as the heirs at law of the late Henry D. Bridges, claim and detain him as their slave. He alleges that he is a free man of color, about twenty nine years of age, and was born in the District of Columbia; that at the age of eight or ten years he was by his sister put under the protection and in the service of lieutenant Delany, then of the said District; that he served as an ordinary seaman in the United States Navy, on board the frigate Constitution, from September, 1825, till July, 1828, when he was discharged at Boston, in the state of Massachusetts; that after his discharge, he returned to his native place, whence shortly after he was clandestinely, forcibly, and fraudulently sent to New Orleans by the said lieutenant Delany, as he believes, and sold as a slave. As the plaintiff has been held in slavery for a number of years previous to the institution of this suit, several successive calls in warranty are to be found in the record, whereby the divers vendors who owned him during this period, have been made parties to this action. The trial took place before a jury, who found in favor of defendants; after a fruitless endeavor on the part of plaintiff to have this verdict set aside, a judgment was entered up in conformity with it, from which he appealed.

The petitioner has failed to show either that he was born free, or that he has ever been emancipated; his evidence renders at most that probable which he should have established by positive proof, admitting that the witnesses make no mistake in point of identity. Their testimony shows that from the beginning of 1826 to July,

1828, plaintiff was with them on board of the United States frigate Constitution, during which time he passed for and was considered by every one there as a free boy, and that none but free persons, or persons belived to be such, were engaged or received on board of vessels belonging to the United States Navy. Some of these witnesses say that the plaintiff, who was then very young, waited on Lieutenant Delany, as a servant, while others represent him as having been one of the crew; in whatever capacity he was on board, the simple fact of his having been there, and of his passing for a free person during a limited time, cannot conclude the defendants who hold him as a slave in good faith and under a just title. It shows the belief which existed in the minds of these witnesses that the plaintiff was free, but leaves us uninformed as to the evidence or grounds on which this belief rested; nor is it shown that the plaintiff has been in the possession of his freedom during the time, and under the circumstances, required by law to entitle him to it by prescription. Nothing that we can see in this record makes it our duty to interfere with the verdict of the jury.

Judgment affirmed.

John McDonough v. Gustave Le Roy.

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Plaintiff holding a mortgage for five thousand dollars on a lot of ground, prayed for an injunction to prevent defendant from selling certain improvements erected on the lot separately from the lot itself, for two hundred and ninety dollars damages, and for general relief. *Held*, that his claim was for damages in addition to the relief sought by preventing the illegal sale of the improvements on the lot on which he had a mortgage, and that the limitation of the damages to a sum less than three hundred dollars, could not prevent his right to appeal.

Workmen, or others having a privilege on improvements erected on ground on which the vendor has a mortgage, cannot cause such improvements to be sold separately from the ground on which they stand; they must be sold together, in order that the highest price may be obtained, to be divided between the parties, according to appraisement; the proceeds of the improvements to the parties having a privilege on them, and any surplus, with the price of the land, to the vendor.

This is an appeal from a judgment of the District Court of the

first district, *Buchanan*, J. The action was orignally instituted before the parish court of Jefferson, and the judgment of that tribunal was affirmed by the court from which this appeal is immediately taken. The plaintiff represented that he had sold a certain lot of ground, on which he retained a mortgage to secure the payment of notes to the amount of five thousand dollars, taken from his vendee for the price of the land; that the defendant, through the agency of the sheriff of the parish, was about to sell a house erected on the lot, separately from the lot itself; and he prayed for a writ of injunction to stay any further proceedings by him, for two hundred and ninety dollars damages, and for 'all other relief.' The defendant denied generally the allegations in the petition, prayed for its dismissal, and for a dissolution of the injunction, with damages.

Martin, J. The plaintiff is appellant from a judgment affirming that of the parish court of Jefferson, dissolving an injunction which he had obtained to prevent the sale of a house built on a lot of ground on which the plaintiff had a mortgage as vendor, and which the defendant, who had a privilege thereon for materials furnished, was attempting to sell separate and apart from the lot on which it had been erected. The parish court was of opinion that although the plaintiff had a privilege on the building, this privilege was not of as high a class as that of the defendant, the seller of the lumber.

The defendant and appellee has prayed for the dismissal of the appeal on the ground of the absence of jurisdiction in this court, the damages prayed for being only two hundred and ninety dollars; to which sum, it is urged, that the plaintiff reduced them for the purpose of depriving the defendant of his recourse to this court, in case the judgment had been for the plaintiff.

It does not appear to us that the appeal ought to be dismissed, the principal object of the plaintiff having been to prevent the sale of a house built upon a lot on which he had a mortgage, which sale he considered as injurious to him. The circumstance of his having claimed damages to the amount of two hundred and ninety dollars, a sum below our jurisdiction, in addition to the relief which is sought, ought not to prevent him from recurring to us, to prevent the illegal sale of a lot on which he had a mortgage, and which it is alleged, he had sold for five thousand dollars.

On the merits, the privileges of the parties are on different parts

of the property, which the law thinks it inconvenient to separate; that of the plaintiff is on the lot, that of the defendant on the house. The plaintiff does not contest the privilege of the defendant, but complains of the illegal manner in which it is sought to be exercised by selling the building separately from the lot.

The Code, art. 3235 provides that 'when the vendor of lands finds himself opposed by workmen, seeking payment for a house or other work erected on the land, a separate appraisement is made of the ground and of the house; the vendor is paid to the amount of the appraisement of the land, and the other to the amount of the appraisement of the building.'

In the case of *Cordeviolle & Lacroix* v. *Hosmer*, 16 La., 590, we held, that 'the appraisement must be made by persons chosen by the vendor and the builder; neither of whom can be concluded by any appraisement made without his knowledge or participation.' In that case the defendant claimed the premises under a sheriff's sale, in consequence of a judgment obtained by the persons who had erected the buildings thereon, without any notice to, and without making the then plaintiffs, holding the vendor's privilege, parties; and therefore the sale was by us considered as illegal. The law abhors destruction and waste; the rights of a creditor are increased by the erection of a building on the mortgaged premises; he therefore has a right to prevent an injury to those rights by the sale of the building separately from the lot, as by such a sale it is probable that the price of the materials only would be obtained. The law therefore guards the rights of the vendor and the builder, by directing the sale of both the objects on which their privileges rest together, in order that the highest price may be obtained.

The parish and district courts in our opinion erred in dissolving the injunction, which the plaintiff had obtained to prevent a sale injurious to his rights.

It is therefore ordered that the judgment of the district court be reversed; that the judgment of the parish court of Jefferson be also reversed, and the injunction reinstated, and made perpetual; the defendant and appellee paying all costs.

G. Strawbridge, for the appellant.

Haynes, for the defendant.

ROBERT C. ARMISTEAD and another v. HARVEY SANDERSON.

Art. 221 of the Code of Practice which provides that a creditor may, under certain circumstances, arrest a debtor about leaving the state, when the debt is not yet due, is limited to cases in which such debtor was a resident at the time of contracting the debt, or being a non-resident, bound himself not to leave the state before giving security, or before the debt became due.

Where a debt has been contracted with a non-resident, by a party who knew him to be such, the former cannot be arrested before the debt becomes due, on the ground that he is about leaving the state with the intention of defrauding his creditors, where such intended departure is the only circumstance offered to justify the suspicion.

THIS case was tried before the Commercial Court of New Orleans, *Watts*, J.

J. C. Clarke, for the appellants.

Bradford, for the appellee.

GARLAND, J. The plaintiffs are appellants from a judgment setting aside an order of arrest, under which the defendant was held to bail. It appears that in the course of the summer of the year 1839, the plaintiffs sold the defendant, who is a merchant residing in Texas, goods to the amount of about $3,500; to secure the payment of which sum, he executed his own notes payable in October, 1839, and January and April, 1840, and also deposited with them as collateral security, a note for $10,000, drawn by a person in Texas, and secured by a mortgage on land in that country On account of these notes, and of the price of other merchandise not so secured, the defendant made several payments, which reduced the whole demand to $2,814, of which $1,079 87, became due on the 13th January, 1840, and about the same sum on the 13th of April following. In the month of December, 1839, the defendant visited New Orleans on business; the sum of $650 was then due to plaintiffs, which he promised to pay or provide for, before he returned to Texas. He accordingly made an arrangement with one A. G. Cochran to pay that amount, of which the plaintiffs were notified. They made no objection to the arrangement, but seem to have looked to Cochran for payment, who promised to pay, but when applied to, postponed doing so under various pretexts, until late in the evening of the day preceding that on which the defendant was to leave on his return home, when they commenced this suit,

claiming the whole sum of $2,814, and alleging that the defendant was about to leave the state with the intention of defrauding his creditors, from the facts that he had not provided for the payment of his debts, and had made false statements relative to the arrangements made for the benefit of plaintiffs. On this affidavit, the defendant was arrested, and gave bail in the sum of $3,300; immediately after which, Cochran called on the plaintiffs and offered to pay all that was due, which they refused to receive unless their whole claim was settled.

The defendant then took a rule on the plaintiffs to show cause why the writ of arrest should not be set aside, on the ground that the affidavit was untrue and insufficient; on the trial of which rule the Commercial Court discharged the defendant from custody, on his depositing in court the sum of $650. We think the judge did not err in so doing. At the time that the plaintiffs contracted with the defendant, they knew that he was a resident of a foreign country, and took from him security for the debt he contracted with them. When he returned in December, 1839, he told Cochran that he must pay them about $650 before he left the city, and arranged with him to settle it. He told the plaintiffs of the arrangement, who appeared to be satisfied, and did not intimate the contrary, until they had applied several times to Cochran for payment, and arrested the defendant, alleging fraud against him, because Cochran did not comply with his engagement. The circumstance of the plaintiffs refusing after they had arrested the defendant, to receive what was actually due them at the time, shows that they wished to extort more from the defendant in the way of security than he had promised to give.

The article 221 of the Code of Practice relied on by the plaintiffs, does not apply to a case like the present. It is limited to cases where the debtor is a resident at the time of contracting the debt, or being a non-resident engages to give security, or not to leave the state before the debt shall become due; but when a debt is contracted with a non-resident, the creditor knowing him to be such, he is not permitted to arrest his debtor before the debt becomes due, on the ground that he is about to depart with the intention of defrauding his creditors, where there are no other suspicious circumstances. In this case, the defendant was about to return to

his known and usual residence, in the ordinary pursuit of his business; and to permit him to be arrested under such circumstances, for a debt not due, would be converting a law made for beneficial purposes, into an engine of oppression.

Judgment affirmed.

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Jacob Hart v. The New Orleans and Carrollton Rail Road Company.

A corporation cannot offer its stockholders as witnesses, though the opposite party may; but when once admitted they may be cross-examined, and give evidence in favor as well as against their interests, on the points to which they were called to testify.

In a suit against a corporation the individual stockholders are not cited, but only those agents or officers whom the law designates as managers of its affairs; such stockholders do not occupy the position of actual defendants, who must be interrogated on facts and articles, but may be summoned by the opposite party as witnesses to testify against their interest.

In an action for damage to plaintiff's carriage by an omnibus belonging to the defendants, it is not necessary that the plaintiff should prove a legal title in the defendants to the omnibus; *prima facie* evidence of title, such as public reputation, will be sufficient, and for this purpose, a witness may be asked whether the defendants were not generally reputed to be its owners. It will be for the latter to show that they were not.

A party will be responsible for damage occasioned by negligence or want of skill in a driver, or by the vicious temper of his horses, where the latter belonged to him, or the former was in his employment.

The responsibility of a master or employer for the acts of his agents or servants, is not limited to cases where he is present and did not attempt to prevent the act complained of.

Appeal by the defendants from a judgment of the District Court of the first district, *Buchanan*, J.

Roselius, for the plaintiff.

T. Slidell, for the appellees, contended: I. That there was no proof that the defendants were owners of the omnibus, or employers of the driver. II. That responsibility only attaches where the employer might have prevented the damage and did not do so. *Strawbridge* v. *Turner*, *&c.*, 8 La., 537. III. That an employer

is never liable for a wanton and malicious act of his agent. *Gaillardet* v. *Demaries*, 18 La., 490.

GARLAND, J. This action is brought to recover $850 as damages, caused by the driver of an omnibus, alleged to be the property of the defendants, negligently running it against a carriage belonging to the plaintiff, which was standing as close to the side-walk as it could be placed, in one of the most public streets of the city of New Orleans; whereby the carriage was broken to pieces, and nearly or entirely destroyed, and rendered useless.

The evidence satisfies us that it was an act of gross negligence; the jury gave $800 damages; and we should not hesitate to affirm the judgment rendered on the verdict, if the evidence had made it probable that the omnibus was the property of the defendants. On that point the testimony does not satisfy us, and we are constrained to set aside the verdict of the jury, and remand the case for a new trial. The only evidence of property was the testimony of one witness, who says that he 'saw the omnibus going along with the name of Carrollton written on it.' We cannot agree with the jury that this is sufficient or probable evidence of property in the defendants.

On the trial, the plaintiff offered Thomas Barrett as a witness, to prove that the defendants were the owners of the omnibus in question, to whom objection was made by their counsel, on the ground that he was incompetent, being a stockholder in the company, and that he could not be interrogated except on facts and articles, which objection was sustained by the court, and the person so offered as a witness rejected; to which opinion the plaintiff took his bill of exceptions. In this we think the judge erred. A corporation cannot offer its stockholders as witnesses in its own behalf, but a party litigating with it may offer them as such, if he chooses to rely upon their statements, and they should be received. They are persons testifying against their own interest, but do not occupy the position of actual defendants, who must be interrogated on facts and articles. In a suit against a corporation all the individuals owning the stock are not cited, but only those agents and officers whom the law designates to manage its affairs; the stockholders may therefore be called on as witnesses, and when once admitted, they may be cross-examined, and give evidence in favor of as well as against their

interests, on those points as to which they are called to testify. Our opinion on this portion of the bill of exceptions makes it unnecessary to decide upon the other parts of it, which relate to the refusal of the judge to permit the plaintiff to amend his petition, and to propound interrogatories to Barrett.

The plaintiff then asked A. E. Crane, if it was not within his knowledge at the time the damage was done, that the defendants were generally reputed and known as the owners of the omnibus in question, and whether it was a matter of public notoriety. To these questions the defendants objected, on the ground that it was hearsay testimony. The objection was sustained, and the plaintiff again excepted. We think the judge again erred in rejecting this testimony. It was not necessary that the plaintiff should prove a legal title to the omnibus in the defendants, but only make out a *prima facie* right; and it would then rest with them to satisfy the jury that public reputation was wrong, or to show, what would not be very difficult in a case of this kind, that the omnibus belonged to some other corporation, company, or individual.

At the time of the trial, the defendants requested the judge to charge the jury, that it should be made appear that the person driving the omnibus was in the employment of the defendants, and that they were not responsible for the acts of a driver employed by a lessee. This the judge refused, and under the pleadings and evidence before us, we think he did not err. The answer is a general denial, and it is not pretended that the omnibus had been leased or hired to any one. If the case stated had been before the court, the refusal of the judge to charge the jury as desired, might have been erroneous; but as it stands upon the record he was correct.

The defendants further asked the judge to charge the jury, that a principal is not answerable for the wanton and malicious acts of his agent, which he refused to do. How far we might be disposed to assent to this as a general proposition, it is not necessary now to decide; but upon the case before us, the judge was not in error. There is no allegation in the petition that the act was wanton and malicious, nor is any attempt made to prove it; but that the damage was caused by the negligence, or want of skill in the driver, or the vicious temper of the horses, for which the defendants are

responsible, if the horses belonged to them or the driver was in their service. The counsel for the defendants has seized upon a single expression in the opinion of the court in the case of *Gaillardet* v. *Demaries*, 18 La., 490, to sustain his position, without endeavoring to distinguish the facts and outlines of the case from the one before us.

The defendants also asked the judge to charge the jury, 'that responsibility only attaches, when the master or employer might have prevented the act which caused the damage, and have not done it.' This the judge refused, and we do not think that he erred. The counsel has asked that a part of the article 2299 of the Code be declared to be law, without taking into consideration the sense and meaning of the whole of it. If the law were such as is alleged, a master or employer could never be made responsible for the acts of his agents or servants, unless he were present and did not endeavor to prevent the act which caused the damage.

In conclusion, we cannot forbear repeating, that if the evidence of ownership of the omnibus by the defendants were rendered probable, we should certainly affirm the judgment, as it is necessary to let the owners and drivers of public and private carriages, and other vehicles know that they cannot with impunity violate the law, and endanger the lives and property of the people quietly passing along the public streets and highways. If the municipal authorities will not use the preventive means under their control, the citizen will hereafter know that the courts of the state are open for redress in cases of actual damage, and that those who administer the law are sensible that a serious evil must be repressed, and are ready to use the power vested in them to effect it.

The judgment of the district court is therefore reversed, the verdict of the jury set aside, and the case remanded for a new trial, with instructions to the judge to admit the testimony of Thomas Barrett and A. E. Crane, and not to give the charge to the jury asked by the defendants, and heretofore refused, and in other respects to proceed according to law; the plaintiff paying the costs of this appeal.

CELESTE BAIRD, and others, Heirs, v. EDWARD LIVINGSTON.

The acceptance by a creditor of an order from his debtor on a third person, the proceeds to be applied towards the payment of his claim, when such order was not intended to operate a novation by substituting a new debtor, will not discharge the original debtor.

Where a creditor, with a view to apply the proceeds to the settlement of his debt, receives from his debtor the conditional acceptance of a third person who promises to pay on the recovery of a certain amount from a fourth: *held*, that the creditor having no direct action against such fourth person, has no other means of establishing his insolvency than by prosecuting the acceptor; that until such insolvency is established, his right of action against the original debtor is suspended, and that prescription will run in favor of the latter only from the period of the proof of such insolvency, and that the prescription of five years under art. 3505 of the Civil Code; will not apply to such a case.

APPEAL by the defendant from a judgment of the Commercial Court of New Orleans, *Watts*, J. The plaintiffs sue as the widow, and minor heirs of Charles Baird, deceased. They allege that the defendant is indebted to the latter in the sum of fourteen hundred dollars, for services as an overseer, rendered in the year 1819. The defendant having sold certain property to Edward E. Parker, took from him a transfer of a debt due from one Parkins, for four thousand and fifty dollars, payable on the 1st of March, 1820. To settle the claim of Baird, and at the same time a debt which he owed to Samuel Elkins, the defendant, on receiving one thousand dollars from the latter, and with the consent of Baird, on the 18th February, 1819, transferred the debt of Parkins to Elkins, who being authorized to pay himself out of the first proceeds of Parkins' debt, accepted a bill drawn by Livingston in favor of one Reynolds, the agent of Baird, on him for fourteen hundred dollars, the amount of Livingston's debt to the latter, payable when the whole amount of Parkins' note should be collected. On the first of August, 1820, Elkins retransferred Parkins' debt to Parker, who, among other things, bound himself to pay the acceptance of Elkins in favor of Reynolds as agent for Baird, whenever the whole amount of Parkins' note should be collected, 'putting himself and his heirs in the place of the said Samuel Elkins in every thing respecting said acceptance.' Parker obtained a judgment against

Parkins, and collected under execution little more than half the debt, the latter being insolvent.

The plaintiffs first sued Parker; and in affirming the judgment of the court below in favor of the defendant, this court declared, 'that the only obligation which Elkins had assumed in regard to Baird, was that which resulted from his acceptance of Livingston's draft, which was conditional; that the condition, the accomplishment of which was necessary to render the obligation of the acceptor absolute, had not happened, and probably never would, as but little more than half the amount of the debt from Parkins had been collected, and he was shown to have died insolvent.' That if Elkins had continued to be the holder of the claim against Parkins, and had pursued him for its recovery with the same diligence which Parker exercised, the plaintiffs would have had no legal claim against him, on his acceptance in favor of their ancestor, for that was conditional, and has never become absolute. That Parker being placed by the contract of retransfer precisely in the situation in which the transferrer would have been without this retrocession, it follows as a corollary that he is not bound to pay the sum promised by the acceptor of the bill, as that promise was contingent, and the contingency necessary to render it absolute has not happened.' Matthews, J. in *Baird's Heirs* v. *Parker*, 4 La. 263. The present action was commenced to recover from Livingston, the original debt, with interest from the first of March, 1820. There was a judgment in the lower court against Louise Livingston, the widow, and sole executrix and universal legatee of the defendant, who had been made a party to the suit on the death of the latter, for the original debt of fourteen hundred dollars, with interest from the 3d of August, 1832, the day of judicial demand. The defendant appealed.

Janin, for the plaintiffs, urged the affirmance of the judgment, with an amendment allowing interest from 1st March, 1820, contending that the defendant had transferred a portion of the claim against Parkins to Charles Baird whom the plaintiffs represent, in satisfaction of the debt now sued for; that the claim against Parkins was secured by mortgage, having been contracted for the price of certain slaves, and that it bore interest; that Livingston had engaged to pay interest for the delay in the final satisfaction

of the debt, and that if the plaintiffs could not obtain payment out of the claim against Parkins, without any fault of their's, and from circumstances beyond their control, they were entitled to recover it from Livingston. He maintained that the prescription of five years was inapplicable, the draft not being negotiable, but payable on a contingency out of a particular fund. Chitty on Bills 41—3. *Chandler* v. *Witherspoon*, 4 La. 67; and that the prescription of ten years would not apply; that two of the plaintiffs were still minors, &c.

R. Hunt, for the appellants. There is no evidence in support of the allegations of the petition. The debt is barred by the prescription of three, of five, and of ten years.

Bullard, J. The history of the present controversy may be learned by referring to the case of the same plaintiffs, against Parker, (4 La.,) in which they sought to recover of Parker, the assignee of Elkins, upon the order given by Livingston to the agent of Baird, their ancestor. Having failed in that action, they instituted the present suit against Livingston, relying upon the order given by him, or delegation of a part of the debt due by Parkins, as evidence of an existing debt still due to them.

The order itself is not produced, but we think was sufficiently accounted for. It seems to us clear from the evidence, that it never was intended as a substitution of a new debtor, so as to operate a novation. It was rather a conditional appropriation of a particular fund belonging to the drawer. The case therefore, upon the merits, presents two questions: 1st, whether Baird or his agent did any thing, or neglected to do any thing by which Livingston was discharged, or put *in duriori casu;* and secondly, whether the present action is barred by prescription.

I. The order was accepted according to its tenor, but the amount never was received by the acceptor, in consequence of the insolvency of Parkins, the debtor. The precise period at which Parkins became insolvent is not shown, but it appears to us clear that Livingston lost nothing in consequence of any negligence of the holder of his order. The fund out of which it was to be paid became unavailable without the fault of Baird, and it would have been equally the loss of Livingston, if the order had never been given.

II. The prescription of five years under the article 3505, of the Civ. Code, does not in our opinion, apply to the present case. The order was not an absolute one for the payment of money, but was drawn conditionally upon a particular fund. As it relates to the prescription of ten years, it is to be remarked, that it could only begin to run from the time the bearer failed to recover the amount, in consequence of the insolvency of Parkins. Baird had no direct action against Parkins, and consequently was without any other means of establishing his insolvency than by prosecuting the acceptor. It is not therefore shown, that ten years had elapsed, within which Baird had a right of action against Livingston, without prosecuting it; for until the failure to obtain payment out of the fund was shown, his action was suspended.

But the counsel for the appellant contends that the record does not contain sufficient evidence of the facts assumed by the plaintiffs; that the record in the case of Baird *v.* Parker, was not in fact given in evidence, though it was agreed it might be, subject to all legal exceptions; and that the defendant had no opportunity to point out and insist upon any such exceptions. We find in the record the expression that the record in that case *is admitted*, thereby making it a part of the written evidence. The party might have insisted upon its production on the trial, but not having done so, we see no objection to the judge's becoming acquainted with its contents as a part of the evidence upon which he was to decide, without insisting *ex arbitrio* upon the production of a copy or of the original, by inspecting it in an adjoining room.

It remains to inquire whether the judgment ought to be reformed according to the prayer of the appellees, so as to allow interest from the time the debt of Parkins fell due, it being for the price of slaves. The argument is, that the order was evidence of a transfer to Baird of a part of a debt which bore interest, and that consequently the holder is entitled to recover that interest from Livingston. This argument would carry the plaintiffs too far; for if there was a transfer of a part of the debt in any legal sense of the word, then Livingston would not be held to warrant the solvency of the debtor. But we regard the contract between the parties as less an assignment of a part of the debt, than a contingent order to pay out of a particular fund when received. That

fund, if received, would have consisted of the principal of Parkins' debt, with the interest which may have accrued, but Baird would have been authorized to receive only $1,400. We think the court did not err in allowing interest only from judicial demand.

Judgment affirmed.

JOHN H. GRAHAM *v.* JOHN SWAYNE.

One who retains money, deposited in his hands as sheriff, after he has ceased to act as such, will continue subject to the summary process provided by law for the benefit of suitors where such officers are concerned. By retaining the money, which he might have deposited in court, he keeps up his official relation with that tribunal.

Where in a suit by attachment, an intervenor establishes his claim to the property seized, the costs must be borne by the party cast. But where, in such a case, by an agreement between the parties, including the intervenor, the property, being of a perishable nature, is sold, and the proceeds deposited to await the decision, the sheriff will be entitled to retain out of the proceeds, the expenses of the sale, and of the safe keeping of the property from the date of such agreement. The agreement was for the benefit of all: and the sheriff was their agent to carry it into effect. The intervenor must look to the plaintiff for reimbursement.

JACQUES CHARBONNET is appellant from a judgment of the District Court of the first district, *Buchanan*, J., ordering him to pay over certain moneys collected by him as former sheriff of the court. The judgment was rendered on a rule to show cause, taken on Charbonnet by Joshua Swayne, who had intervened and established his claim to the property in contest; and the former appealed.

F. B. Conrad, for the appellant. The court erred: 1. In overruling the exception of Charbonnet to the mode of proceeding by rule. The latter having ceased to be sheriff, could no longer be considered an officer of the court. The remedy of the intervenor was by an action in the ordinary form. 2. In not allowing the appellant all his expenses subsequent to the agreement for the sale.

Peyton, for the intervenor. One who retains money received by him while sheriff, will continue amenable to the summary process

of the court. The intervenor is entitled to the full amount for which his property sold; the officers must look to the plaintiff for their costs.

MORPHY, J. On the 2d of December, 1834, the plaintiff sued out a writ of attachment against the defendant, a non-resident, which was levied on two flat boats, then lying in the parish of Jefferson, in front of the city of Lafayette, loaded with clap boards, lumber, and scantling; two days after, Joshua Swayne intervened, claiming the property attached as his, and damages for the wrongful seizure of it. On the tenth of the same month, the plaintiff, the intervenor, and the attorney appointed to represent the absent defendant, entered into a written agreement, which sets forth that by reason of the perishable nature and exposed situation of the property attached, and of the expenses attending the custody of the same, the said parties agree and consent that the cargoes of these flat boats be landed by the sheriff of Jefferson, divided into lots conveniently formed to favor an advantageous sale, and sold by him, after the usual advertisements in the parish of Jefferson, and in two of the newspapers of New Orleans, for cash; and that the proceeds remain deposited in the hands of the said sheriff, to await the decision of the suit. Under this agreement, and an order of court obtained upn it, the property attached was sold, and brought the sum of $514. After a long course of litigation, the contest in relation to the ownership of these boats, having been decided in favor of the intervenor, in February, 1839, he took a rule on Jacques Charbonnet, formerly the sheriff of the parish of Jefferson, to show cause why he should not pay over to him the proceeds of the sale made under the order of court, as above stated. To this rule J. Charbonnet excepted, on the ground that having ceased to hold the office of sheriff for about three years, he was not amenable to the court below in this summary way, but should have been cited as in an ordinary suit; and for further answer he averred, that with the consent and at the instance of the intervenor, he had become responsible for and paid a large sum of money, which he had a right to retain, and that he has always been ready and willing to pay the balance over to him. The judge *a quo* made the rule absolute for $171 72, the balance remaining after deducting from the proceeds of the property sold, $237 paid by the sheriff on execution, to the

hands of the boats for their wages, and $125 28, for the commission, advertising and other expenses, occasioned by the sale.

Both parties complain of this decree, the former sheriff contends that his exception to the manner in which he was brought into court was erroneously overruled, and that the judge improperly disallowed a charge of $75, which he expended for the safe keeping of the boats and their cargoes up to the day of the sale. The appellee, on the other hand, prays that the judgment be amended so as to allow him the $514, the amount of the sale, free from any costs or charges, all which, he urges, should be borne by the plaintiff, who was cast in the suit.

The judge, in our opinion, correctly overruled the exception insisted upon by the appellant. For any moneys remaining in his hands, in his late official capacity, he continued to be subject to the summary process, provided by law for the benefit of suitors in such cases, although he had ceased for some time to hold his office. By retaining this money, which he might have deposited in court when he resigned, he kept up his official relation to the court which rendered the judgment. He continued to act as sheriff, *quoad hoc*, and has no right to complain of a mode of pursuit, to which he has voluntarily subjected himself.

As to the costs and charges, detailed in the late sheriff's statement returned into court, all the items in it are admitted to be correct, but the intervenor urges that as he succeeded in proving his ownership of the property attached, he is entitled to receive its entire proceeds, and that the late sheriff must look to the plaintiff for the payment of his costs, which in all cases, under the Code of Practice, must be borne by the party cast. This, we believe to be true, in relation to the general costs in the suit, which have not been deducted by the judge from the proceeds decreed to be paid over to the intervenor; but as regards the expenses and charges incidental to the sale of the flat boats and their cargoes, and incurred subsequently to, and under the agreement, by virtue of which the court ordered them to be sold, it appears to us, that the sheriff is entitled to retain their amount out of the funds in his hands, and that the intervenor must himself look to the plaintiff for their reimbursement to him. The sale thus made by consent, was for the mutual benefit of the parties, and the sheriff was their agent

to carry it into effect. The judge below, having apparently adopted this distinction, which we believe to be a correct one, it is not easy to perceive why he disallowed the expense incurred for the safe keeping of the property from the date of the agreement up to the day of the sale. This disbursement was a necessary one, as the thing in dispute consisted of articles which could easily have been carried away, if not properly taken care of; it is one, moreover, sanctioned by law, and being for the preservation of the property, must be paid out of its proceeds. Code of Pr., arts. 283, 659, 661. Civ. Code, art. 3191. This item, which for the time above specified, would amount to $55, should have been allowed.

It is therefore ordered that the judgment of the district court be so amended as to make the rule absolute only for the sum of one hundred and sixteen dollars and seventy-two cents, which the late sheriff of the parish of Jefferson, Jacques Charbonnet, is hereby decreed to pay the intervenor, with costs below; those of this appeal to be borne by the appellee.

GABRIEL LOMEL *v.* WILLIAM S. CHAPPELL.

APPEAL by the defendant from a judgment of the Parish Court of New Orleans, *Maurian*, J.

Buscail and *Roselius*, for the plaintiff.

Maybin, for the appellant.

BULLARD, J. This case turns upon mere questions of fact, which we are satisfied were correctly solved in the court below. The appellee has waived his claim for damages.

Judgment affirmed.

DANIEL P. MARR and others v. WILLIAM BARNES.

The proprietors of a cotton yard and press, will be responsible for cotton deposited with them, and not accounted for.

A motion requiring plaintiff to state more clearly his cause of action, is too late after an answer to the merits.

THE defendant is appellant from a judgment of the Commercial Court of New Orleans, *Watts*, J., in favor of the plaintiffs, commercial partners in New Orleans, trading under the firm of Marr, Brown & Co.

Elmore and *King*, for the plaintiffs.

Collins, for the appellant.

GARLAND, J. This suit is instituted to recover the value of a quantity of cotton in bales, which the plaintiffs stored in the warehouse of defendant, and which was never returned or accounted for, at the rate of $64 33 per bale. In the petition and account annexed, nineteen bales are alleged to have been lost; but an examination of the testimony shows that although twenty two bales were for a time in controversy, that in fact, but thirteen were lost, and for the value of them the plaintiffs have judgment.

The counsel for the plaintiffs have urged us to amend the judgment, alleging that the judge of the Commercial Court had made an error in calculation against them; but an examination of the record shows, that the judge detected the error before he signed the judgment, and corrected it. The counsel has probably been led into the mistake by not observing the discrepancy between the sums stated in the reasons of the judge and in the judgment itself, which was signed some days after the reasons were read in court.

The defendant, in his points, says that there is error apparent on the face of the record, the court below having overruled a motion made by his counsel, requiring the plaintiffs to set forth more particularly the cause of action. We do not think the judge erred. The petition, with the account annexed, seems to state the cause of action clearly enough to be understood by an ordinary mind; but if not, we think the motion came too late, it being after an answer to the merits was filed.

Judgment affirmed.

ORLANDO SALTMARSH and another v. GEORGE W. AVERY.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

MARTIN, J. The petition states that the defendant and one Reeside, having been successful bidders for two contracts for the conveyance of the mail, the defendant purchased the right of Reeside therein, and, in consideration of the sum of six hundred and fifty dollars received from the plaintiffs, agreed to transfer the said contracts to them, who undertook to transport the mail according to these contracts, from and after the 1st of January, 1835; and that the defendants further agreed to make such assignments, and to do whatever might be necessary to enable the plaintiffs to receive from the post office department such sums as might become due upon the contracts; and that accordingly, the plaintiffs, at the defendant's instance, carried the mail under these contracts from the day aforesaid until the 1st of December, 1837; for which they were entitled to receive eight thousand eight hundred and sixteen dollars, of which eighteen hundred and eighty four dollars have been paid to them, leaving a balance of six thousand nine hundred and thirty two dollars and sixty seven cents yet due to them. They further allege that the defendant has utterly neglected to make the aforesaid assignments, or take any of the steps necessary to enable them to receive the said sum from the post office department. Wherefore they pray judgment for the said sum, and for general relief.

The answer admits the adjudication of the two contracts to the defendant and Reeside, the purchase of Reeside's share by the defendant, the latter's agreement to assign the two contracts to the plaintiffs for the consideration expressed in the petition, and their agreement to receive the same from the 1st January, 1835, and to transport the mail from that date. It avers the assignment of the contracts to the plaintiffs, who accordingly undertook to carry the mail, and received the sum stated in the petition. All the other allegations were denied. There was a verdict and judgment for the defendant, and the plaintiffs appealed, after an unsuccesful attempt to obtain a new trial.

Two bills of exception, which were taken in the court below on

the part of the plaintiffs, have been formally abandoned in this court. A close examination of the testimony has impressed us with the conclusion, that the new trial ought to have been granted. The assignment of the two contracts is not, in our opinion, sufficiently established by the evidence.

It is therefore ordered that the judgment be reversed, the verdict set aside, and the case remanded for a new trial; the defendant and appellee paying the costs of the appeal.

Lockett and *Micou*, for the appellants.

Eustis and *Robinson*, for the defendant.

John Charles Mason v. The Louisiana State Marine and Fire Insurance Company.

In an action on a policy of insurance, an allegation in the petition that the defendants were legally put in default will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, where such compliance is proved on the trial.

A new trial should never be granted, where the ends of justice have been attained.

The verdict of a jury will not be disturbed, where it does not appear that the judge, from whom a new trial was asked, erred in refusing it.

Appeal from the Commercial Court of New Orleans, *Watts* J.

Roselius, for the plaintiff.

C. M. Conrad, for the defendants.

Martin, J.* The defendants are appellants from a judgment by which the plaintiff has recovered the value of goods insured in their office, and destroyed by fire. The answer admits the insurance, and that a portion of the goods insured was destroyed by fire. It denies all other allegations in the petition, and especially that the damage amounted to the sum claimed; it avers that the plaintiff has exaggerated his loss, with a view to defraud the defen-

* *Morphy*, J., being interested, did not sit on the trial of this case.

dants, and under a clause of the policy has forfeited his claim. The plaintiff had a verdict, which the defendants attempted to set aside, on the ground that it was contrary to law and evidence; and that the plaintiff offered no proof of compliance with the several conditions of the policy, particularly of the preliminary proofs of loss. The new trial was refused. Our attention is arrested by a bill of exceptions to the opinion of the first judge, sustaining the defendant's opposition to the production to a witness of a statement of the loss made by the plaintiff, who had called this witness. As the bill of exceptions was taken by the appellee, who has obtained a judgment of which he does not seek the amendment, it is useless to examine whether the judge erred, as the error, if there be any, wrought no injury to the plaintiff.

The appellants' counsel has urged that the judge erred in overruling his objection to the verdict, on the ground that no proof of compliance with the several conditions of the policy was offered, and particularly of the preliminary proofs of loss. By a clause in the policy, article 7, it is provided, that 'all persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to this company, and, as soon as possible after, to deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same by their oath or affirmation, and by their books of account, or other proper vouchers, as shall be reasonably required; and shall procure a certificate under the hands of a magistrate, or sworn notary of the city or district, in which the fire happened, not concerned in such loss, importing that he is acquainted with the character and circumstances of the person or persons insured, and knows or verily believes that he, she, or they really, and by misfortune, without any kind of fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and until such affidavit and certificates are produced, the loss money shall not be payable; also, if there appears any fraud or false swearing, the claimant shall forfeit his claim to restitution or payment, by virtue of this policy.'

The petition does not express a compliance in detail with the provisions of this clause, but alleges that the defendants were legally put in default. The record exhibits proof of the plaintiff

having furnished the defendants with the statement of his loss required in the above article. The president of the company was called upon to produce, and actually brought into court the statement of the loss, delivered to him by the plaintiff. This is the statement, to the truth of which the plaintiff sought the testimony of the witness, on the rejection of which, a bill of exceptions was taken. It is therefore clear that the statement of the loss was delivered by the plaintiff. It is not alleged that it was delivered untimely, nor that any proof was required preliminarily. The statement is certainly a notice, the judge therefore did not err in refusing the new trial, on the alleged ground of the due notice and statement not having been given. It does not appear that the absence of the certificate was urged before the jury. The certificate was to state that the officer who grants it, knows the character and circumstances of the party, and knows or verily believes, that without any fraud or evil practice, he has sustained a loss to the amount claimed. The answer admits the loss of the plaintiff to a certain amount, but complains of its exaggeration only. The unqualified admission of the destruction of part of the goods insured, excludes the idea of a destruction by fraud or evil practice. The exaggeration was therefore the only matter in issue. On this part of the case, the certificate of the justice or notary, would be of very little aid, for it suffices that he shall certify his belief. The jury was of opinion that there was no exaggeration. The first judge thought that there was not any, and we are unable to come to a different conclusion. A new trial ought never to be granted when the court is of opinion that the ends of justice have been attained; and this court will never disturb a verdict, when it does not appear to them, that the judge from whom a new trial was asked, did not err in refusing it. On the merits, the case is clearly with the plaintiff.

Judgment affirmed.

La Brouche Dussin v. Frederick Charles and another.

In an action by the endorsee against the maker and endorser of a note given for the price of a slave, evidence that the slave has instituted a suit for her freedom, will not entitle the defendant to a continuance until such suit can be decided; but at most to a suspension of the payment of the price, until security is given according to art. 2535 of the Civil Code.

Possession of a negotiable instrument endorsed in blank, is *prima facie* evidence of ownership, and yields only to proof to the contrary.

Appeal from the City Court of New Orleans, *Duvignaud*, J.

Rousseau and *Budd*, for the plaintiff.

Grivot, for the appellants.

Murphy, J. This is an action by the endorsee of a promissory note of six hundred dollars, against the drawer and endorser; the latter admit their signatures, but aver that the note sued on does not belong to the plaintiff who acts only as the agent of his daughter Elizabeth F. Angelina La Brouche, who is the true proprietor of the same, and against whom they have a valid defence to set up. They allege that this note was given in part payment for the purchase of a *quarteronne* girl named Myrthée, with her child, who were sold to them as slaves for life by said Angelina La Brouche; that the said Myrthée is the daughter of one Ismene Bedeau, a free woman of color, and has brought suit to recover her freedom before the parish court in and for the parish and city of New Orleans; and that they, the defendants, have already paid a note of six hundred dollars, being the first instalment of the price. The answer concludes with a prayer that this suit may not be tried until the final decision of the case pending in the parish court; that there be judgment in favor of the defendants, decreeing the note sued on to be returned to them, and the sale of Myrthée cancelled and annulled; and further, that plaintiff do refund the six hundred dollars already paid for the slave. There was a judgment below in favor of the plaintiff, and the defendants appealed.

On the trial, the defendants moved the court for a continuance on the facts set forth in their answer, as the grounds of their defence to the merits; and upon the refusal of the judge to grant their motion, they took a bill of exceptions, to which our attention

has been drawn. It is clear that these facts admitting them to have been all fully proved, could furnish no proper ground either for a continuance of the cause, or for such a judgment as has been demanded by the defendants in their answer; they could at most have given them the right which they have not claimed, of suspending the payment of the price until security was given according to art. 2535 of the Civil Code. But the evidence exhibited by the record, does not even satisfactorily make out the allegations of their answer. From the fact that plaintiff is the general agent of Angelina La Brouche during her absence, it does not necessarily follow that he has no interest in this note, upon which he sues in his own name as owner. Possession of a negotiable instrument endorsed in blank, is such *prima facie* evidence of ownership, as yields only to contrary proof. It is true that the legal presumption created by plaintiff's possession of the note, is weakened by the circumstance of his being the agent of his daughter, but defendants could have destroyed it entirely by putting to plaintiff, among their interrogatories, the simple and direct question, whether he was the owner of this note or whether he did not prosecute its recovery as agent of Angelina La Brouche. This they have not done, nor have they placed before us a copy of the sale of the slave Myrthée, nor a transcript of the record of the suit alleged to have been brought by her to recover her freedom.

Judgment affirmed.

JOHN G. YOUNG *v.* AMEDÉE ALPUENTÉ.

Where the record contains neither statement of facts, bill of exceptions, nor certificate that it contains all the evidence adduced below, and there is no assignment of errors, the appeal must be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

F. B. Conrad, for the plaintiff.

Morel, for the defendant.

BULLARD, J. The transcript containing neither statement of facts, nor bill of exceptions, nor certificate that all the evidence adduced below is in the record, and there being no assignment of errors, the motion to dismiss the appeal must prevail.

Appeal dismissed.

PHŒBE CARMICHAEL and others, Heirs, *v.* JAMES ARMOR.

Where the appellee has joined issue on the merits, it will amount to a waiver of any objection on account of want of citation or the insufficiency of the appeal bond; and where such objections have been thus waived by parties cited in warranty, their warrantee cannot set them up.

APPEAL by the plaintiffs, as heirs of John F. Carmichael, from a judgment of the District Court of the First District, *Watts*, J.

GARLAND, J. The plaintiffs claim two lots of ground, having each sixty feet front on Magazine street, by a depth of one hundred and twenty feet, french measure, being Nos. three and four in square No. fifty eight, in the suburb La Course, said square being bounded on two sides by Magazine and Robin streets, to which they say they have a good and sufficient title, but that the defendant has taken possession of them without right, and refuses to deliver the possession, claiming the lots as his property. The defendant admits that he is in possession of the lots described in the petition, situated in the suburb La Course, and says he is the owner of them by virtue of two notarial sales made to him by John McDonough, who undertook to warrant him in his title to the same, and he calls upon him to defend it. McDonough appeared, and for answer, denied the right and title of the petitioners to the lots claimed in the petition, but further avers, if their ancestor ever had any right to them, that he was divested of it, and the same was transferred to him, McDonough, by virtue of two sales thereof made by the marshal of the city of New Orleans, on the 10th of December, 1828, in pursuance of two writs of *fieri facias* issued by Gallien Preval, associate judge of the city court of New Or-

leans, in the suit of *The Mayor, Aldermen, and Inhabitants of New Orleans* against *Vacant lot No.* 3, and *The same* against *Vacant lot No.* 4, at which sales he, McDonough, became the purchaser, for the prices set forth in the acts of sales, which sums he says were applied to the payment of John F. Carmichael's debts. This answer further alleges that the mayor, aldermen, and inhabitants of New Orleans are bound to warrant the title of said lots to the respondent; and he calls them in warranty, and prays for judgment against them in case of eviction.

The last named warrantors appeared and denied the right of Carmichael to the lots described in the petition. They further say that, if he ever had any right to these lots, he has been divested of it, by virtue of the judgments and sales mentioned in McDonough's answer, to whom they admit they were sold as stated. They say Carmichael was a non-resident; that he had no agent who was known in the city of New Oleans; that the sum of nine dollars and thirty cents was owing them for taxes for the year 1828, on the lots Nos. 3 and 4, which not being paid, they proceeded to have them sold, whereby costs were incurred to the amount of twenty two dollars, which sum they say the plaintiffs should pay them, in case the lots be decreed to be their property.

Upon the trial, it was shown that the lots described were the property of John F. Carmichael; and that the right to them was once in him, has not been contested, either in this court or in that of the first instance, but the defendants contend that he has been divested of all title by the sales set up, in their answers. The proceedings which led to these sales were instituted under an act of the legislature, approved March 18, 1828, relating to the collection of taxes due the city; which says, that whenever a sum of money shall be due to the corporation of the city of New Orleans, by *non-residents* for taxes, who have no agent in the city, the said corporation may, after certain proceedings, cause the lots to be seized and sold, by a proceeding *in rem*, before a judge of the city court. See Acts of 1828, p. 102.

The corporation in July, 1828, alleging that they had a claim for taxes upon the lots in controversy, which are situated in the *faubourg* La Course, commenced a suit in their name, against 'the vacant lot No. 4 of square 58, *faubourg* Annunciation, whose owner

is unknown,' and a like suit against 'the vacant lot No. 6, square No. 58, *faubourg* Annunciation,' before Gallien Preval, an associate judge of the city court, who in three days after the proceedings were commenced, gave two judgments for four dollars and sixty five cents each, and costs amounting to twenty two dollars, upon which executions issued, and the city marshal sold lots Nos. 3 and 4 to McDonough, for $440, who afterwards sold them to the defendant, Armor, by notarial sales, for $7000.

It was further shown at the trial, that for several years previous to 1829, Carmichael had an agent in the city of New Orleans, who paid the taxes on his property; and receipts for them for the years 1826, 1827, and 1828 were produced, on one of which, the name of the agent is written, as being the person to whom it was to be presented for payment.

We find in the record some testimony as to the agents of plaintiffs' ancestor since 1828, but it is immaterial to the present issue, and it is unnecessary to recapitulate it.

The charge of the judge to the jury, was confined very much to the question, whether Carmichael had an agent in the city of New Orleans or not, and upon the evidence before them, the jury found a verdict for the defendant.

On the 18th of April, 1837, the day that the verdict was given, the plaintiffs moved for a new trial; on the 22d of the same month it was argued by counsel; on the 6th of May following, the judge overruled the motion, and gave a final judgment for the defendant, which he signed immediately, from which the plaintiffs immediately appealed. At the foot of the petition of appeal we find the following agreement, signed by one of the counsel, who it appears from the record, represented the defendants on the trial. 'We agree to this appeal, and that the same be made returnable into the supreme court as soon as practicable, New Orleans, May 6th, 1837.' On the 31st of May, 1837, the record was filed, and on that day, McDonough joined issue upon the merits. On the 8th of April, 1839, Armor, in person, accepted service of a notice made by plaintiffs' counsel, to revive the suit in the name of Carmichael's heirs, and on the 19th of February, 1840, nearly three years after the appeal, he changes his counsel, and in contravention of the agreement a motion is filed asking a dismissal of the

appeal, on the ground that his co-defendants, who had appeared and answered without objection, were not cited, and that their names were not in the appeal bond, also, that the judgment in his favor was signed prematurely, and consequently the appeal was premature, although the plaintiffs against whom the judgment was rendered insist it is final.

The case has not been argued in this court by the counsel, who, according to the record, represents Armor, but by the advocate of the interests of McDonough, against whom no judgment is rendered at all; and were it not for the apparent earnestness of the counsel, and his assurance that he had confidence in the positions he has assumed, we should not believe he was serious; but as he asserts that he is, we must briefly notice his points. According to the settled practice of this court, neither McDonough nor the corporation of New Orleans can complain of a want of citation, or insufficient bond, as they have joined issue upon the merits, and consequently waived any such objection; and we know of no law that requires or authorises Armor to assume the defences they have waived. They come into court to defend him, and it looks a little officious on his part, to become their protectors. As to the objections, that the judgment was signed too soon, and that the appeal is premature, they appear to us without foundation, and not sustained by the decision relied on in 4 Martin, N. S., 528, which was a question altogether different from the present. It is the first time we ever heard of a party insisting that a judgment in his own favor was signed too soon, whilst his adversary is insisting the contrary, and contending that it is final. We see no sufficient grounds for dismissing the appeal. The facts of this case can scarcely be distinguished from that of *Carmichael* v. *Aikin's Heirs*, 13 La., 205, which was brought to recover a lot adjoining the two in question, and said to have been sold at the same time, under a similar proceeding. In that case, in that of *Morris* v. *Crocker*, 4 La., 147, and in the case of *Hodge* v. *Cleary*, 18 La., 514, we have given an interpretation to the law under which these lots were pretended to be sold; and though this case may in some respects differ from those, the law and equity of it is as decidedly in favor of the plaintiffs as any of them.

Under a judgment against lots Nos. 4 and 6, in square 58, in the

faubourg Annunciation, lots No. 3 and 4, in square No. 58, in that *faubourg*, are said to have been sold; and under that sale the defendant claims title to lots No. 3 and 4, in square No. 58, in the *faubourg* La Course. Independent of the manifest error in the proceedings under which the defendant claims title, it is further shown that Carmichael's taxes for the year 1828 were paid, and the receipt of the city treasurer is in the record.

The verdict of the jury is so palpably erroneous, and the proceedings under which the lots were sold so clearly illegal, that we cannot hesitate in reversing the judgment; and the case is too strongly with the plaintiffs to justify us in pursuing the ordinary practice of remanding it for a new trial, except so far as it relates to the defendant and the parties cited in warranty.

The judgment of the District Court is therefore reversed, and the verdict of the jury set aside; and this court, proceeding to give such judgment as, in their opinion ought to have been rendered in the court below, does further order, and decree that the plaintiffs, as heirs of John F. Carmichael, deceased, do have judgment against the said James Armor, for the two lots of ground described and claimed in the petition, and that they be quieted in their title and possession of the same, and recover costs in both courts: and it is further ordered, that so far as it respects the demand of the said James Armor against his warrantor, James McDonough, and of said McDonough against the Mayor, Aldermen, and Inhabitants of New Orleans, this cause be remanded to the District Court, to be proceeded in according to law.

L. C. Duncan, for the plaintiffs.

Hoffman, for McDonough.

The Church of St. Patrick v. Charles Bingley Dakin and another.

Arbitrators must determine as judges, agreeably to law.

An award must decide the whole matter submitted, and not go beyond the submission. It must be certain, final, and conclusive, leaving no matter of fact or law undecided.

Every fact and question must be so presented by an award, as to enable the court to act on the award itself, and to execute it as a whole; though the mere omission to determine an exact sum will not annul it, where the arbitrators have given the necessary information to enable the court to fix the amount without going out of the award itself.

The provision of art. 3096 of the Civil Code, that an award, in order to be executed, must be approved by the judge, is only intended to invest it with sufficient authority to insure its execution, and not to submit its merits to the examination of the judge, which can only be done by appeal.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Larue, for the plaintiffs.

J. W. Smith, for the appellants, contended that the award must be set aside as uncertain, and not determining all the matters embraced in the submission. 3 Pandectes de Pothier, p. 436, No. 12. Ib., p. 442, Nos. 18, 20. Ib., p. 452, No. 33. Ib., p. 468, No. 47. 1 Vinnius ad Pandectas, p. 264, No. 18. 1 Rolle's Abridgment, Arbitrament, H., 14, 27, 29, fol. 251. Ib., Q., 1, fol. 263. 3 Viner's Abridg., pp. 64, 67, 97. 2 Petersdorff's Abridg., p. 165, Nos. 1, 3, *and note*. Ib., p. 171, *n*. Caldwell on Arbitration, 107, 115. *Waite* v. *Barry*, 12. Wendell, 380. *Thomas* v. *Molier*, 3 Ohio Rep., 267. 2 Harrison's Rep., 507. 1 Pike's Rep., 206. Watson on Awards, 115.

Garland, J. In the month of June, 1838, the plaintiffs entered into a contract with the defendants, by which the latter undertook, for the sum of $115,000, to construct and complete the building known as St. Patrick's Church, in this city, upon certain terms and conditions. The contract, among various other stipulations, says:

'It is furthermore agreed, that if any difficulty shall occur between the aforesaid parties, growing out of the works herein specified, which they, the said parties, cannot settle amicably between themselves, then and in that case, the subject or matter in dispute

shall be referred to three or five disinterested persons, to be chosen by the said parties in the usual manner, who shall be fully competent and qualified to judge and decide upon all questions and matters arising out of the erection of said building and works; the decision of which said persons, chosen as aforesaid, shall to all intents and purposes, be final and binding in the premises, without any appeal therefrom whatsoever.'

'It is also agreed and understood, that any and all contentions or matters of difference whatsoever, arising in the premises, shall be settled and adjusted in the manner above mentioned, and that in no case shall the aforesaid parties be permitted to have recourse or appeal to any court of justice for the settlement of any such contentions or differences.'

In the execution of the contract various disagreements arose between the trustees and contractors, although the superintendence of the work was confided to a building committee named by the plaintiffs at the time of making the contract, which differences, it was agreed should be submitted, in conformity to the contract, to arbitrators. On the 23d of August, 1839, a bond was signed by the parties, in which, after reciting the terms of the contract, it is said: '*now as differences have arisen between the said board of trustees and the said firm of Dakin & Dakin, they hereby agree to submit all such difficulties, and contentions, and matters of difference whatsoever, arising in the premises,*' to five persons, 'the decision of which five persons, shall to all intents and purposes, be final and binding in the premises, without any appeal therefrom.'

Under this submission, the parties appeared before the arbitrators, and on the part of the plaintiffs, it was alleged:

1. That the defendants had violated the contract, by failing to comply with its specifications. 2. That they had failed to place bond timbers in the walls, under all the openings, to prevent cracks and equalize the settling of the building. 3. That they had failed to bind the buttresses to the walls with suitable timbers, as agreed on, to prevent them from cracking off from the main walls. 4. That they had not put in the window frames, and completed the wood work as the walls were put up, whereby they were weakened. 5. That the walls had cracked, and the work was executed in an inferior manner. 6. The plaintiffs ask that the whole contract be

annulled and damages awarded them, it being impossible, from the hostility of the undertakers, to finish the church under their superintendence.

What the precise propositions submitted by the defendants to the arbitrators were, does not distinctly appear, but it seems that they objected to the submission of the question, of annulling the contract on the ground of the alleged hostility of the parties.

The arbitrators, after an examination of some testimony, of the contract, and the building, decided:

1. That the defendants had violated their contract by omitting to place bond timbers in the walls, as required, in consequence of which they were weakened and otherwise injured.

2. That as the contract required the inside of the walls to be framed and battened out for lath-work, the said arbitrators were of opinion that wall strips should have been put in the wall as it went up, as attempts to nail on or attach pieces for the purpose would weaken the walls.

The arbitrators then proceed to specify various remedies for the defects in the work, and conclude:

3. 'That as it appears from some misunderstanding between the parties, feelings of a hostile nature have arisen between them, which must inevitably prevent them from proceeding together in the further progress of the building, with that degree of harmony which should exist between parties so connected, it is, in our opinion, much better for both parties, that the contract between them be now annulled; but in doing this a sufficient recompense should be made to Messrs. Dakin & Dakin for their plans, and for the trouble they have had in conducting the progress of the building thus far, making due allowance, however, for the damages to which they have subjected themselves, by the aforesaid omissions.'

They therefore decree that the contract be annulled, that Dakin & Dakin have $5000 for their plans of the building, and that they pay $5000 damages to the plaintiffs. They further decree that the trustees, as a compensation to defendants for their labor and trouble, 'shall allow them eight per cent upon the amount of money already expended upon the building, over and above the actual cost expended thereon, such cost to be ascertained by proper vouchers, or bills and receipts furnished therefor.' All contracts made by Da-

kin & Dakin, previous to the submission, for labor or materials, to be assumed by the trustees, who are also to pay for all materials upon the premises. They conclude by saying that if, upon the settlement of the said accounts, Dakin & Dakin shall be indebted to the trustees, the amount shall be deducted from the price of the drawings before mentioned.

In this situation the award leaves the parties. The trustees file it with the notary, in whose custody the original contract is, and upon a certified copy, and an account, stated by themselves, showing a balance of $1807 60 against the defendants, they commence this suit, praying that the said defendants be compelled to comply with said award, that it be approved and confirmed, and its execution decreed and enforced. To this the defendants object, on a variety of grounds, among others:

1. That the award is null, because the arbitrators exceeded their powers, and passed on matters not submitted to them, and particularly in annulling the contract.

2. The award is void for uncertainty, inasmuch as it does not enable the court to give any judgment or decree for the payment of any specific sum to either party.

3. That it is not a final settlement and adjustment of all the accounts and matters in controversy between the parties, which were referred to the arbitrators.

The other objections taken by the defendants, it is not now necessary to notice; nor is it material, in the view we have taken of the case, to decide upon the bills of exceptions taken by both parties.

The judge of the Commercial Court heard the testimony offered by both parties, and after a learned opinion gave a judgment homologating and confirming the award, and decreeing 'that either party be at liberty to apply to the court to take steps to fix:

'1. The value of the materials on the premises at the time of the award.

'2. The amount on which defendants are to be allowed their compensation of eight per cent on monies expended.

'3. The contracts made by defendants with third persons, which are to be assumed by plaintiffs.

'4. For process to carry the award, and judgment of the court

on the award, and on the matters aforesaid into execution; and that each party pay one half the costs.'

From this decree, which both parties say is final, the defendants have appealed. We have looked at it most attentively, and taken something more than the usual time for reflection upon it, but have to confess our inability of seeing what either party has gained, or what advance has been made towards the adjustment of the accounts between them, and the ascertaining on which side the balance is, After a long investigation by the arbitrators, and a severely contested trial in the inferior court, the result seems to be, that either party may take such measures as they wish to ascertain the state of their accounts, and find out which is in debt to the other. In other words, they can as soon as they please, involve themselves deeper in litigation. Neither the award nor judgment has terminated their difficulties, nor does the latter supply the omissions of the former in any manner.

The judge of the Commercial Court has, in the course of his opinion, stated with much force many of the legal principles which regulate awards of arbitrators, but we differ from him very widely in their application. He admits very candidly that if those principles are to govern, that a judgment should be given for the defendants; but he disregards the decisions of the Supreme Court of the United States, and what we believe to be the law of this state, and goes to Bacon and Rolle for authority to sustain his opinion.

It was clearly the intention of the parties in this case, to submit their difficulties to the persons named as arbitrators and not as amicable compounders, no special authority as such being given in the submission. 7 La. 476. They had therefore to determine as judges, agreeably to law. Civ. Code art. 3077. And the object of the litigating parties being a final settlement of their difficulties under the contract, it was the duty of the arbitrators to have brought it to a conclusion, and by their award to have fixed the amount one was owing the other, or to have given some certain data upon which a calculation of the amount could be made. We concur most fully in the opinion given by Judge Marshall in the case of *Carnachan*, &c. v. *Christie*, &c., 11 Wheaton, 446, in which he says an award must decide the whole matter submitted, and must not go beyond the matter comprehended in the submission;

it must be certain, final and conclusive, and leave no matter of fact or law undecided. The art. 3096 of the Code says, that the award in order to be put in execution, ought to be approved by the judge; but this formality is only intended to invest the award with sufficient authority to insure its execution, and not to submit to the judge the examination of its merits, except in case of appeal. This principle was acted on in the case of *Janes* v. *Richard*. 3 La. 486.

When parties choose to submit their differences to arbitrators, we are disposed to give all possible effect to their decision, but the courts are not to become mere auxiliaries, to supply their defects and omissions. Every fact and question must be so presented as to enable the court to act on the award itself, and execute it as a whole, unless called on by an appeal to correct it. The mere omission of an exact sum would not perhaps annul an award, if the arbitrators had given the necessary information to enable the court to fix it, without going out of the award. Civ. Code art. 3094.

In this case, we think that the arbitrators exceeded their authority, in annulling the contract between the parties. By referring to it, we see that the difficulties intended to be submitted to arbitrators, were such as should be 'growing out of the works herein specified,' which they cannot settle, also such 'contentions or matters of difference' as may arise in the premises. Nearly the same words are used in the bond signed by the parties. When before the arbitrators, under the general clause contained in the submission, the defendants objected to the contract being annulled, or to that question being considered; and a reference to the first *projet* of a submission shows that that question was proposed to be submitted, and declined.

The award is in itself so uncertain, that we do not see what judgment we could give on it that could be executed, and we must disregard it entirely, leaving the parties to exercise their rights under the contract.

The judgment of the Commercial Court is therefore reversed, and ours is in favor of the defendants as in case of non-suit; the plaintiffs paying costs in both courts.

JOHN GRANT v. LAURENT MILLAUDON.

THIS case, and that of Millaudon against Grant, were consolidated in the Commercial Court.

Roselius and *Duncan*, for the plaintiff.

Benjamin, for the appellant.

MARTIN, J. These two cases were consolidated by consent. There was a verdict and judgment against Millaudon, and he appealed. The cases turn entirely upon a question of fact; no question of law appears to have been raised therein. After a patient hearing, and a close examination of the testimony, it does not appear to us, that any thing can justify our interference in the case.

Judgment affirmed.

PIKE and HARRIS v. JAMES WATERS ZACHARIE and another.

THIS case was tried before the District Court of the First District, *Buchanan*, J. The draft, accepted by the defendants, was in these words: 'On the completion of our contract for building your Clinton street stores, please pay to Messrs. Pike and Harris, or order, seven hundred dollars.'

Roselius, for the plaintiffs.

H. H. Strawbridge, for the appellants.

BULLARD, J. This is an action upon an order or draft, drawn by Dakin and Dakin, upon the defendants, and accepted by them, payable on the completion of the contract of the drawers with the defendants, for the building of certain stores. The answer admits the acceptance; but the defendants aver that they are in no manner indebted to the plaintiffs. There was judgment against them, and they appealed.

It appears in evidence that at the time this suit was instituted the stores were completed, and even in possession of the defendants. It is true the drawers left some trifling part of the work

unfinished, which was afterwards done by other workmen employed by the defendants. But it is not shown that the defendants have sustained any loss, and it is clear they have their recourse upon Dakin and Dakin for a reimbursement of that expense, if they have not already been paid, which is not shown.

We are of opinion that the parties did not contemplate that the finishing of the work should be in any manner at the risk of the holder of the order, in the sense of the word contended for by the defendants; but that the acceptance fixed a time of payment, which was uncertain. But whether the buildings were completed by the drawers themselves, or at their expense by the owners, appears to us immaterial; at least until it is proved that a loss has been sustained by the defendants, which is neither shown nor pretended.

Judgment Affirmed.

THOMAS HUNDLEY v. H. N. SPENCER and another.

Where a factor who has received instructions to pay a debt out of the proceeds of property consigned to him for sale, for the purpose of preventing an attachment, advances the amount, and pays the debt before any attachment is levied, his privilege for such advance on the property consigned will be superior to that acquired by a subsequent attachment.

THE plaintiff is appellant from a judgment of the Commercial Court of New Orleans, *Watts*, J., in favor of Stephen Franklin and John D. Henderson, garnishees.

J. W. Smith, for the appellant.

Maybin, for the garnishees.

MORPHY, J. This suit began by attachment. Franklin and Henderson, commission merchants of this city, were made garnishees, and the usual interrogatories propounded. In their answers, they acknowledge that they owe a small sum of money to H. N. Spencer, and that they hold sixty four bales of cotton belonging to J. Grafton, the other defendant, and consigned to them for sale, on which cotton they claim a privilege and preference for advances on it to the amount of $2,187 50. Judgment was en-

tered below in favor of the plaintiff for the amount claimed, and the garnishees were ordered to pay over the sum admitted to be due to the defendant, Spencer, reserving for a future trial a rule taken on the garnishees to show cause why the proceeds of the sixty four bales of cotton attached in their hands, should not first be applied to the payment of the plaintiff's judgment.

The record shows that Grafton being indebted to the Canal Bank in this city, in a sum of about $6000, under a judgment obtained in Mississippi where he resides, had directed Franklin and Henderson to make an arrangement with the bank, by which, on paying in November, 1840, a sum of $3000 out of the proceeds of his cotton, a stay of execution for six months should be granted for the balance, to prevent his property from being levied upon and sacrificed to satisfy the judgment. After much negotiation between the garnishees and the bank, who declined to accept the proposition at that time, Grafton instructed his agents to pay unconditionally to the bank the $3000 out of the proceeds of his cotton, after discharging sundry small debts which he mentions to them; requesting at the same time that, after making this payment, they would use every possible exertion to obtain from the bank some indulgence, by granting time, for the balance of his debt. On the 6th of February, 1841, Franklin and Henderson becoming apprehensive that the intended appropriation of the proceeds of this cotton might be interfered with by some attachment which they understood was about to issue against Grafton, paid to the Canal Bank the $3000 as an advance on the cotton which they had not yet sold, and this sum was by order of the bank credited to Grafton according to his wishes, on the execution standing against him in Mississippi. Under these circumstances, the judge below allowed the privilege of the garnishees, and the plaintiff appealed.

The evidence clearly establishes that the money was paid to the Canal Bank, before the levying of plaintiff's attachment. The return of the sheriff states, it is true, that the writ was placed in his hands on the 6th of February, 1841, but it does not show when the service was made. It is not therefore at all inconsistent with the testimony of Canfield, the clerk of the garnishees, who testifies that he was in the office of the latter when the sheriff's officer

served the attachment; and that on receiving the paper he wrote on it with his pencil a memorandum which was produced on thn trial, and which shows the notice to have been received by him oe Monday morning the 8th of February, 1841, at about nine o'clock. The writ issued probably at a late hour on the preceding Saturday, and could not be served on the same day. This testimony is moreover corroborated by the president and cashier of the bank, who state that when Franklin paid the money on Saturday the 6th of February, he said to them that no attachment had actually issued, but that he had reason to fear that the amount he was directed to pay the bank might be attached in his hands. But it is urged that Franklin and Henderson had no authority from Grafton to make any advances to or for him; that his letters show that his debt was to be paid to the bank out of the proceeds of his cotton, and that the advance was made only with a view to cover the sixty four bales of cotton and defeat the plaintiff's attachment.

We can hardly believe that Franklin and Henderson were violating the orders of Grafton, or acting without authority, when they voluntarily paid as an advance on his cotton, a debt which he had repeatedly directed them to discharge out of its proceeds. In commercial parlance, the term *proceeds* means, we believe, the money or fund represented by the property consigned. If a factor undertakes or receives orders to make a payment out of the proceeds of a consignment, it is well understood, and such we believe is the usage among commission merchants, that if the produce consigned is yet on hand when the time of payment arrives, the factor is to advance the money; and that in so doing, he is considered as paying out of the proceeds of the property. Such appears to have been the understanding of Grafton, for by his proposition to the bank, the $3000 were to have been paid in November, 1840, when at this early part of the business season he could hardly expect that his cotton would have been sold. Had the bank then accepted the proposed arrangement, and had the money been paid at that time by Franklin and Henderson, they would have done nothing more than what was expected of them by Grafton; and moreover, the latter would have been thankful to them for an advance which they were not strictly bound to make. In the course pursued by Franklin and Henderson, we can see

nothing to blame; they acted with the avowed intention of defeating any attachments against Grafton, which might prevent the appropriation he had made of his money to pay a legitimate debt which it was his interest to discharge. He had surely the right of paying one creditor in preference to another; and in acting as they did, the garnishees complied with his often expressed wishes and injunctions. In this, they did no injury to the plaintiff, whose rights, under his attachment, had not vested, when they paid Grafton's debt to the bank.

Judgment affirmed.

JOHN B. HEREFORD v. WILLIAM H. CHASE.

An accommodation endorser of a note is a mere surety for the maker; and a privity exists between such surety and the creditor which compels the latter to preserve unimpaired all his rights against the debtor, where he intends to look to the surety for payment. This obligation is a corollary of the right of subrogation, established by law in favor of the surety who pays the debt of his principal; and if the creditor fail to comply with this obligation, or destroy or impair the right of subrogation to his mortgages or privileges, the surety will be released.

The vendor of slaves, sold in a lump, received from the purchaser a note for the price, endorsed by a third person as surety for its payment, and subseqently purchased from his vendee a part of the slaves: *held*, that the vendor's privilege, and the surety's right of subrogation to it, were indivisible; that the latter existed entire as to all the slaves, for the full amount of the debt; and that it could not be divided and restricted to certain slaves, for certain amounts, at the will of the original vendor; and that by such re-purchase the endorser was discharged. Had the vendor repurchased all the slaves, his privilege would have been extinguished by confusion; and the subrogation to which the surety would be entitled on paying the price, would have become impossible.

APPEAL from the Commercial Court of New Orleans, *Watts* J.

MORPHY, J. This action is brought against the endorser of a promissory note of $6750, drawn by J. Desmont. The answer admits the endorsement, but denies that legal notice of the protest has been given to the defendant. It further avers that defendant endorsed this note as surety for the maker, to enable him to purchase a lot of ten slaves from the plaintiff; and that he is not liable

inasmuch as Hereford, who had the privilege of vendor on these slaves, entered into an arrangement with the said maker and vendee, by which, for the sum of $4675, he took back or repurchased of him nine out of the ten slaves, for which the note sued on was given, thereby depriving the defendant of the privilege of vendor on these slaves, to which he would have been subrogated in law but for the said agreement, composition, or resale between the plaintiff and the maker of the note. It is further averred that the debt has been fully paid and satisfied. There was a judgment below in favor of the plaintiff for $3458 50, from which the defendant has appealed.

The facts set forth in the answer are made out by the evidence in the case. It shows that on the 21st of February, 1837, the plaintiff sold to Desmont ten slaves for the price of $6750, and received the note sued on, which bore interest from its date at the rate of ten per cent per annum; that on the 11th of March, 1839, the plaintiff repurchased of Desmont nine of the same slaves, with the addition of a child born after the sale, for $4675. It does not appear whether the tenth slave died or remained in the possession of the vendee, nor is the relative value of the slaves shown.

It is clear that the defendant was an accommodation endorser, and as such merely a surety for the maker. It is equally clear that by the law of suretyship there is a privity between the surety of a debtor and the creditor, which compels the latter to preserve all his rights against the debtor unimpaired, when he intends to look to the surety for payment. This obligation on the part of the creditor is a corollary of the right of subrogation, which the law has established in favor of the surety who pays the debt of his principal. If the creditor fail to comply with this obligation, or does any act which destroys or impairs this right of subrogation to his mortgages or privileges, he thereby releases the surety. Civ. Code, art. 3030. Pothier on Oblig., part. 11, chap. 1, art. 6, sec. 2.

In the present case, if the plaintiff repurchased all the slaves, his privilege of vendor was extinguished by confusion; and the subrogation to which defendant was entitled on paying the price, became impossible by plaintiff's act. If the tenth slave, not mentioned in the reconveyance, is yet living in the possession of Desmont, of which there is no evidence in the record, the defendant's right of

subrogation has been materially impaired. It stands restricted by the act of plaintiff to a single slave, while he is decreed to pay $3458 50, with interest at the rate of ten per cent per annum from the date of the resale. The ten slaves having been sold in a lump, the vendor's privilege, and consequently the defendant's right of subrogation to it, were indivisible; it existed entire with regard to all of them for the full amount of the debt. It could not, without his consent, be divided, and restricted to certain slaves, for certain amounts, at the will and pleasure of the plaintiff. Were it otherwise, this right of subrogation, which, we believe, enters largely into the contemplation of all persons who become sureties for others, might be entirely done away with. Cases might well occur, in which collusion between a vendor and vendee would render it entirely nugatory. The course pursued by plaintiff has, in our opinion, released the endorser.

It is therefore ordered that the judgment of the Commercial Court be reversed, and that ours be for the defendant with costs in both courts.

C. M. Jones, for the plaintiff.

L. Peirce, for the appellant.

CORA ANN SLOCOMB and others v. JOHN A. WATKINS.

In a suit against the endorser of a note, where the name of the latter has been erased, the plaintiff must account for the circumstance, or the obligation will be considered as cancelled. The affidavit of the plaintiff will not be received to prove that such erasure was made through error or accident; it must be established by legal evidence, not by the declarations of the party who seeks to recover.

Arts. 2258, 2259 of the Civil Code relate exclusively to written obligations, which have been either lost or destroyed. They are in derogation of the general principles of evidence, and will not be extended to cases not clearly within their purview.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Elmore* and *King*, for the appellants, contended: 1, that the

affidavit of the plaintiffs should have been received to account for the erasure of defendant's name. Civ. Code 2258. *Cantrelle et al.* v. *Percy*, 17 La. 520. 2, that the judgment, if against the plaintiffs, should have been one of non-suit.

Peyton and *J. W. Smith*, for the defendant. The testimony of Dennis, one of the makers of the note, was properly received. The maker of a note is a competent witness, in an action against the endorser, to prove payment. Chitty on Bills, 653—8. The erasure of the defendant's name is evidence from which it will be presumed that the obligation has been extinguished, until the contrary be proved. Ib. 214. *Sollèbellao* v. *Reeve's curator*, 3 La. 56.

Morphy, J. This suit is brought on a joint and several promissory note, drawn by Thomas R. and James A. Dennis, to the order of, and endorsed by the defendant. The answer pleads want of protest and notice; it avers further, that defendant is not liable, because his name has been erased on the instrument sued on, and his obligation, if it ever existed, thereby cancelled, and because the makers have paid a judgment obtained against them in Mississippi on this same note. There was a judgment below in favor of the defendant, from which this appeal has been taken.

The record shows that in 1838, a suit was brought in Mississippi against the makers, in the name of J. A. Watkins, for the use of Slocomb, Richards & Co., and a judgment obtained; but the evidence has failed to convince us that it has ever been satisfied by the defendants in that suit. One of them, it is true, has sworn that, in November, 1839, he paid the money into the hands of the sheriff, charged with the execution of the judgment, and took the receipt of that officer, which he says he has mislaid. To this testimony we cannot give much credit, as it is contradicted by the attorneys who prosecuted the suit. They declare that the makers were insolvent, and that nothing could be made out of the judgment. The returns of the sheriff show moreover, that several writs issued successively for the amount due by them, but without success, and that the last of these writs issued after the time when this payment is pretended to have been made at the sheriff's office. It further appears, that under this last writ two negro women were seized and sold in January, 1840, but that the proceeds of the sale

were applied to previous executions, of which there was a great number against them in the hands of the sheriff.

In relation to the first ground of defence, the name of the defendant as endorser on this note, appears to have been stricken off and erased, but at what time, by whom, and for what purpose, has not been either alleged in the petition, or satisfactorily shown on the trial below. The plaintiffs who produce a cancelled instrument, and seek to recover on it, are bound to account for the erasure; unless they do so, it is evidence that the obligation resulting from the endorsement has been annulled. They accordingly offered their own affidavit to show the circumstances under which the obliteration was made; but this mode of proof was objected to, and in our opinion properly rejected below, on the ground that no party can be permitted to give evidence in his own behalf. It has been pressed upon us by the appellant's counsel, that this case, from its peculiar circumstances, should come under articles 2258 and 2259 of the Civ. Code, and that the plaintiffs' affidavit should have been received. We think otherwise. The articles referred to, should not be extended to cases which are not clearly within their purview, as they are in derogation of the general principles of evidence. They relate only to written obligations, which are either lost or destroyed. The formalities of advertising the loss, and in some cases of giving security to indemnify the party against the re-appearance of the instrument, as well as the faculty given of proving its contents by parol, show conclusively that these articles contemplate only written obligations, the absolute absence of which must be accounted for, when they are made the foundation of a suit. In the present case, the note is produced, but the endorsement on it is cancelled. The fact that this erasure was made by error or accident, must be shown by legal evidence, not by the declarations of the party who seeks to recover on it. This erasure, it is urged, must have been made by the attorneys who brought suit on the note in Mississippi, as in their testimony they say that in order to sue in the name of the payee for the benefit of the endorsees, it was necessary to strike off his name; but when examined to the point, they deny that this erasure was made by them, and there is no evidence to show that it did not exist when the note was handed to them for collection. If the holder of

a note to secure or facilitate to himself the means of suing one of the parties to it, erases the name of another party, such an act may well be looked upon as a voluntary release of the latter's liability. But the evidence leaves it doubtful who made this erasure; and until it be shown to have been done through accident or by the hand of a third person, without the consent of the plaintiff, the presumption that the obligation has been extinguished, will stand as a bar to any recovery. 3 La. 56. We think, however, that under the circumstances of this case, the judgment below should have been one of non-suit.

It is therefore ordered that the judgment of the Commercial Court be reversed, and that ours be for the defendant, as in a case of non-suit, with costs in both Courts.

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JAMES ERWIN v. JAMES MCKINNEY and another.

JAMES ERWIN v. LAWRENCE R. KENNY and another.

Where it is provided by a rule of court 'that in all cases where notice is required, and no time is specified in the Code, three days shall be sufficient,' a rule taken on the 29th of June to show cause on the 1st of July, will not be sufficient notice.

THE plaintiff in these cases is appellant from a judgment of the District Court of the First District, *Buchanan*, J. The cases were united on the trial of the rule in the court below; and they were brought up together.

MARTIN, J. The plaintiff complains that the first court illegally made absolute a rule which defendants had obtained against him, to show cause why satisfaction should not be entered on two judgments he had obtained against the defendants. He has built his hope of relief at our hands on several grounds, one of which only it suffices to examine. The rule was obtained on the 29th of June, to show cause on the 1st of July, when it was made absolute in the absence of the plaintiff. By one of the rules of the District Court, which comes up in the record, it is provided that: 'In all

cases where notice is required, and no time specified in the Code, three days shall be held sufficient, except in cases where the depositions of witnesses are to be taken under a commission.'

The 30th of June was the only intervening day between the 29th, on which the rule was obtained, and the 1st of July, on which it was made absolute. It is therefore clear, that the plaintiff had not the three days notice, which the above rule requires; and as the record shows that he was absent on that day, nothing authorises the inference that he waived his right thereto. The rule was therefore erroneously made absolute.

It is therefore ordered that the judgment of the District Court, making the said rule absolute, be reversed, and that the rule of the 29th July be discharged; the defendants and appellees paying the costs of the appeal.

Peyton and *J. W. Smith*, for the appellant.

McKinney, for the defendants.

William H. Martin, Executor, v. Esther Drake and her Husband.

A wife not separated in property from her husband, cannot bind herself jointly with him, either as drawer or endorser of a note, for a debt contracted on account of the community during the marriage.

A note drawn by a wife not separated in property, to the order of her husband, and endorsed by him, is void; the latter cannot enforce its payment, nor transfer by endorsement any right to a third person to enforce it.

This case was tried before a jury in the District Court of the First District, *Buchanan*, J. The plaintiff sues as the testamentary executor of Arthur Mann.

Morphy, J. The defendants have appealed from a judgment condemning them, *in solido*, to pay $600, on a note drawn by Esther Drake, to the order of, and endorsed by David Drake, her husband. The petition contains the usual averments of demand, protest, and notice to the endorser. The defendants admitted their

signatures, but alleged that the note sued on was given in part payment of a slave, which slave was afflicted, at the time of the sale, with an incurable redhibitory disease, well known to the vendor, Arthur Mann, when he sold the slave to them.

The record does not show, nor is it pretended that Esther Drake was separated in property from her husband, that the purchase was for her individual account and benefit, or that her husband endorsed the note only as her surety, to pay a debt of her own. Under the pleadings, we are bound to presume that the purchase was made, and the note given, on account of the community; if so, the wife cannot bind herself jointly with her husband for a debt contracted during the marriage, either as drawer or endorser of a note. Civ. Code, arts. 2412, 2371, 2372. If the defence set up by the answer is left out of view, the note sued on is evidence of a debt contracted by the wife towards her husband. If such a contract be void, as can hardly be doubted, the husband, who could not enforce it himself, has not, by his endorsement, transferred to plaintiff any such right.

On the merits of the case, so far as the husband is concerned, he has failed to support his defence below by any evidence. The appeal was clearly taken by him for the purpose of delay.

It is therefore ordered that the judgment of the District Court be reversed as relates to Esther Drake, and affirmed as to her codefendant, David Drake, with ten per cent damages and costs.

Roselius, for the plaintiff. No counsel appeared for the appellants.

FRANCOIS H. PETITPAIN v. THEREZE PALMER and her Husband.

A note drawn by a wife, payable to her husband, is absolutely null and void in the hands of the latter; no law recognizes any obligation of the wife to the husband, resulting from any contract between them. But where such note has been endorsed by the latter to a third person, it will bind the endorser.

THIS case was tried before a jury in the District Court of the First District, *Buchanan*, J. There was a verdict and judgment against the defendant, and A. W. L. Palmer, her husband, *in solido*, for the amount of the note sued on.

Pepin, for the plaintiff.

Grymes, for the appellants.

MARTIN, J. The defendants are appellants from a judgment on a note of the wife payable to the husband, and endorsed by him to the plaintiff. The appellees' counsel has contended:

1. That a note is always presumed to be given for a valid consideration, and that it devolves on the adverse party to show the contrary.

2. That the incapacity of the wife to make a contract, is removed by the authority of the husband.

3. That the wife should have pleaded her incapacity, and the want of consideration, if either existed, or that the note was not given for her benefit.

I. With regard to the note, it was absolutely null and void in the hands of the husband; for we are ignorant of any law which recognizes an obligation of the wife to her husband, resulting from any contract between them. Civ. Code, art. 1784.

The counsel for the plaintiff has, however, in the argument, placed the case before us as a contract of suretyship entered into by the husband for the wife, under the form of an accommodation note with his endorsement thereon; and he insists that she is bound to restore the money thus obtained from the plaintiff for her benefit. If this be available, it ought to have been alleged and proved. In the absence of such allegation and proof, it would be idle in us to notice it.

Strong as this case is in favor of the wife against the plaintiff, it is equally so in favor of the latter against the husband, who, by his

endorsement made a new contract, available to the endorsee as against himself, but not against the wife.

It is therefore decreed that the judgment of the court below be reversed as far it relates to the wife, and that ours be for her with costs in both courts; and that so far as relates to the husband, the judgment be affirmed with costs in both courts, and ten per cent damages as for a frivolous appeal.

Same Case—On a Re-hearing.

Where the attention of the court has not been drawn to a bill of exceptions in the record, either by the points filed, or on the first hearing of the case, it will not be noticed on a re-hearing.

Martin, J. This case was before us at the February term, 1840, when we reversed the judgment so far as it related to the wife, and gave ours in her favor; and affirmed the judgment as far as it related to the husband. The plaintiff and the husband solicited and obtained a re-hearing. The former has limited his pretensions to the substitution of a judgment of nonsuit to that in favor of the wife, and has relied on the case of *Maddox* v. *Maddox*, 12 La., 13; a case which differs widely from the present, the claim of the plaintiff having been recognized by the wife in her will. In the present case, the plaintiff has no other evidence of his claim against the wife than her note given to her husband, and by him tranferred to the plaintiff. As the husband could not have maintained a suit upon this note, the plaintiff cannot have acquired such a right from him. *Non dat qui non habet.* It would be idle to give him the opportunity of a second attempt to enforce such a claim.

The husband has claimed a new trial, with the view of seeking relief at our hands against what he calls the error of the first judge, who, he alleges, erroneously refused, on the motion of his counsel, to retain the jury, who were about to leave the box for the chamber of deliberation, when the counsel came into court from an adjoin-

ing room, in which he was detained by business while the trial proceeded in the District Court. As no points were filed by this defendant, and our attention was not drawn at the first hearing of this case to the bill of exceptions, which was taken on the judge's refusal, it would be irregular to notice it on a re-hearing.

It is therefore ordered that the judgment heretofore rendered remain undisturbed.

Samuel Hermann and another v. The Union Bank of Louisiana.

The plaintiffs, as agents of the owner of certain notes, deposited them with defendants for collection; the notes were not paid at maturity, nor were they regularly protested, but were subsequently returned to the owner. Plaintiffs, considering themselves responsible to the latter, sued defendants in their own names, alleging that the notes were deposited by them as agents of the owner: *Held*, that the plaintiffs not having paid the amount of the notes, and their agency having terminated, payment to the plaintiffs would not exonerate the defendants from the claim of the owner.

Appeal from the Parish Court for the parish of New Orleans, *Maurian*, J.

Martin, J. The plaintiffs seek to make the defendants responsible for the amount of a bill of exchange and three promissory notes deposited with them for collection, on the allegation that due diligence was not exercised by the latter. The defendants pleaded the general issue, and averred that if the plaintiffs sustained any loss in regard to the above bill and notes, it resulted from the delays and irregularities of the mail, for which the defendants cannot be held responsible. The plaintiffs had judgment for the aggregate amount of the bill and notes, with legal interest from the day on which they ought to have been respectively protested, with costs. The defendants appealed. The case is before us on a point which does not appear to have received the consideration of the first judge. The plaintiffs sue in their own names, but allege that they deposited the bill and notes, as agents of J. L. & S. Joseph & Co., of New

York, in the latter part of 1836, and returned them to their principals as soon as they received them back from the defendants; and that their said principals answered, that they considered the plaintiffs as liable to them for the amount of the bill and notes, due diligence not having been exercised by them; and that their said principals have since failed, and their assignees still hold and consider them (the plaintiffs) as liable. The plaintiffs not having paid the amount of the bill and notes, the defendants are, if due diligence was not used, still liable to the assignees of the Josephs. The agency of the plaintiffs probably terminated on their returning the bill and notes to the former, and certainly on the failure of the Josephs, or the assignment of their estate; and payment to the plaintiffs would not exonerate the defendants from the claims of the assignees of the Josephs.

It is therefore ordered that the judgment be reversed, and that ours be for the defendants, with costs in both courts.

Mazureau, for the plaintiffs.

Denis, for the appellants.

James Hart v. Alfred Philipps.
The Same v. The Same.

No appeal will lie from a judgment on a rule to show cause why an attachment should not be set aside; the judgment is an interlocutory one, works no irreparable injury, and may be corrected, if erroneous, by appeal from the final judgment.

The defendant has appealed in these cases, from judgments of the Commercial Court of New Orleans, *Watts*, J.

Eggleston, for the plaintiff.

Van Dalson, for the appellant.

Morphy, J. The petitioner in each of these cases sued out a writ of attachment, under which eleven packages of goods were seized, but afterwards released upon the defendant's giving bond as required by law. A rule was then taken on the plaintiff in each case, to show cause why the writ of attachment should not be set

aside, on certain grounds filed at the time of taking the rule. This motion having been overruled by the inferior judge, the defendant appealed. We deem the appeal premature. The order made on the rule is an interlocutory, not a final decree; it works no irreparable injury to the appellant; the error, if it be one, can be corrected by appeal from the final judgment in the case. Code of Prac. art. 566.

Appeals dismissed.

JACOB L. FLORANCE *v.* THE ORLEANS NAVIGATION COMPANY.

The right given by art. 686 of the Code of Practice, to a creditor having a privilege or special mortgage on property seized for a debt of which all the instalments are not due, of causing the whole property to be sold on terms of credit corresponding with the periods at which such instalments are payable, results from the principle that every part of the property is mortgaged for the whole of the debt, the holders of the different instalments secured by the same mortgage being entitled to participate in the distribution of the proceeds. But it does not follow that the mortgagor, who is bound for the whole debt, notwithstanding the insufficiency of the property mortgaged, can, in an action by the holder of a note for the instalment already due, claim as a right that the property should be sold on such terms, especially when the poceeding is by an ordinary action.

JOHN M'DONOUGH, the purchaser of the property sold, under an execution against the defendant, is appellant from a judgment of the Commercial Court of New Orleans, *Watts*, J., rescinding the sale. The property sold is the same that was mortgaged to secure the note sued on, with others not due at the institution of the suit.

BULLARD, J. The plaintiff having obtained a judgment against the defendant, upon a promissory note, *paraphed* on its face by a notary public, took out a writ of *fieri facias*, under which the sheriff proceeded to sell a lot of ground belonging to the defendants. On the second exposure, the land was sold at twelve months credit.

The defendants then took a rule against the sheriff, to which the

purchaser was afterwards made a party, to show cause why the sale should not be set aside and annulled, in as much as the same was not made in conformity to law, and the land was not advertised to be sold on such terms as the act of mortgage required. This rule was made absolute, and the purchaser appealed.

The appellee relies in support of the judgment rendered in the first instance, upon articles 686 and 707 of the Code of Practice, the first of which provides, that 'when a seizing creditor has a privilege or special mortgage on the property seized, for a debt of which all the instalments are not yet due, *he may demand* that the property be sold for the whole debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such instalments as are not due.'

In the case of *Pepper* v. *Dunlap*, 16 La. 163, this court affirmed a judgment of the District Court, ordering the mortgaged property at the suit of the holder of one of the notes to be sold upon the terms of credit stipulated in the original contract. The article above recited gives this right to the mortgagee in an hypothecary action, and it results from the principle that every part of the property is mortgaged for the whole of the principal debt, and that in the distribution of the proceeds of the pledge, the holders of the different instalments of the same mortgage are entitled to participate. But it does not appear to us logical to conclude from hence, that the mortgagor, who is bound at all events to pay the whole of the debt, notwithstanding the insufficiency of the property mortgaged, can claim as a right the application of the same principle, especially when, as in the present case, the proceeding is by an ordinary action, and the sheriff in executing the *fieri facias* is bound to sell sufficient property for cash to satisfy the writ.

The case of *Reed et al.* v. *Schmidt*, 11 La. 72, which has been cited by the counsel for the appellee, does not appear to us to support his pretensions. In that case the judgment had directed the manner and terms of the sale, and the sale which was made by the sheriff, was set aside because he had not proceeded according to the judgment. In the present case, we are of opinion that the court erred in rendering the rule absolute.

It is therefore ordered that the judgment of the Commercial

Court be reversed, and that the rule be discharged with costs in both courts.

Josephs, for the plaintiff.

G. Strawbridge, for the appellant.

Hennen, for the defendant.

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JAMES GALLIER v. JAMES WALSH and another.

A provision in articles of co-partnership, that all disputes growing out of the partnership transactions shall be submitted to arbitration, does not apply to an action instituted after the dissolution of the partnership by the death of one of the members, for a final settlement of the partnership affairs.

By applying for the administration of an estate, in a parish different from that of his domicil, a party subjects himself to the authority of the courts within whose territorial jurisdiction the administration is granted, in every thing that concerns such administration.

An action for a final settlement of the partnership affairs, against a surviving partner and the curator of the estate of a deceased partner, in which the petition sets forth acts of mismanagement and fraud, is not a claim for a sum of money in the meaning of art. 924 of the Code of Practice, and as such exclusively within the jurisdiction of the Court of Probates. Such an action is properly brought before a court of ordinary jurisdiction, in which a jury, if called for, may pronounce on the question of fraud.

A surviving partner will not, by consenting to the appointment of experts by a Court of Probates to examine the partnership books after the death of his co-partner, so subject himself to its authority as to preclude his right to except to its jurisdiction.

Where one, of two obligors on a joint note who must be sued together, has died, the action must be brought before a court of ordinary jurisdiction.

ACTION by the plaintiff before the Commercial Court of New Orleans, *Watts*, J., against Walsh, and Denis Murphy, curator of the succession of James Burdon, deceased.

This case was submitted without argument.

G. B. Duncan, for the appellant.

Canon, *Macready*, and *R. M. Carter*, for the defendants.

MORPHY, J. The plaintiff has appealed from a decree ordering the transfer of this cause to the Court of Probates of the parish of Jefferson. The suit is brought to obtain the settlement and liquidation of a partnership, heretofore existing between the plaintiff,

Michael Collins, James Walsh, and James Burdon, for carrying on the business of buying, selling, manufacturing, and dealing in all kinds of timber, or any other business that the parties might think proper to pursue. A large piece of property, together with a saw mill, and a number of negroes were put into the partnership, which was to be solely managed by Walsh and Burdon, under the name of Walsh & Co. Some time after the formation of the partnership, Collins having expressed a wish to withdraw from it, the plaintiff purchased his interest in the concern; and about one year afterwards Burdon died in the parish of Jefferson, and Denis Murphy was appointed curator to his estate. The petition, which is one of unusual length, after stating in detail the conditions and articles of the co-partnership, sets forth a series of acts of mismanagement and fraud on the part of the said Walsh and Burdon, which are alleged to have caused to plaintiff the loss of large sums of money, and to have led to the seizure and sale of the saw mill and slaves belonging to the partnership. Both defendants filed exceptions to this petition. The judge below took, we think, a correct view of that made by Walsh to the petitioner's right of action. The tenth article of the contract of co-partnership, under which, it is contended, that all disputes growing out of the partnership transactions must be submitted to arbitration, does not apply to the present case; it refers obviously to differences of opinion, and disputes touching the proper construction of the contract, and to the rights of the parties under it during the existence of the partnership. But the contract is now at an end, and this action is for a general settlement and final liquidation of all the partnership affairs.

The other defendant, Murphy, after making the same objection, urged that the District Court had no jurisdiction over him, in his capacity of curator of the estate of Burdon. The wording of these exceptions is rather vague; as they allege, however, that defendant's residence is in the parish of Concordia, his plea to the jurisdiction appears to be two-fold: 1st, on account of his domicil being in that parish; and 2d, on account of the nature of the suit, which being, as he contends, for a sum of money, can only be entertained in the Court of Probates of Jefferson, so far as the estate of Burdon is concerned.

We perfectly agree with the judge *a quo*, that by applying for an

administration at a distance from his domicil, the defendant has subjected himself to the authority of those courts within whose territorial jurisdiction the administration has been granted, in every thing that concerns such administration; but we do not believe that this suit is, within the meaning of article 924 of the Code of Practice, a claim for a sum of money against the estate, exclusively within the jurisdiction of the Court of Probates of Jefferson. It is true, that upon the final settlement of the partnership concerns, the estate may be declared to be indebted to the plaintiff for the alleged acts of mal-administration and fraud, but the petition claims of the succession no specific sum or debt; it only calls for an adjustment of the accounts, and the correction of the partnership books, which are charged to have been falsely and fraudulently kept by the defendants. When the liability or indebtedness of the deceased shall have been determined contradictorily with all the partners, as it must be in cases like the present, the plaintiff will probably have to seek the collection of whatever sum may be declared to be due to him, in the Court of Probates, concurrently with the other creditors of the estate, as he would have to do in the case of a judgment rendered by the latter court itself. Code of Pr., art. 987. The action was, we think, properly brought before a court of ordinary jurisdiction, in which a jury, if called for by any of the parties, can pass upon the questions of fraud presented by the pleadings. Even if the Court of Probates of Jefferson could take cognizance of a suit of this character, James Walsh, who must necessarily be made a party to it, is not amenable to that tribunal. We do not think that by his consent to have experts appointed by the Court of Probates to examine into the state of the partnership books, after the death of Burdon, he has so subjected himself to its authority, as to preclude his right of excepting to its jurisdiction, had the present suit been brought there. In a case of conflict between the two courts, such as would be presented in a suit on a joint note, where the two obligors must be sued together, and where one of them has died, the limited, would have perhaps to yield to the general or ordinary jurisdiction; but in the present case no such conflict exists, as, in our opinion, the District Court has jurisdiction *ratione materiæ* as well as *ratione personarum.*

It is therefore ordered that the judgment of the District Court be

reversed; that the exceptions to its jurisdiction be overruled and set aside; and that this case be reinstated on the docket, and proceeded in according to law. The costs of this appeal to be borne by the appellees.

ALBERT PAWLING v. NIMROD HOUREN and others.

In an action on a note, not protested at maturity, where the defendants have not been put in default before suit, and there is no evidence of any promise to pay interest, it will only be allowed from judicial demand.

GEORGE and James Heaton are appellants from a judgment of the Commercial Court, *Watts*, J.

MORPHY, J. The defendants were sued on a note of five hundred dollars, drawn jointly and severally by them, to the order of, and endorsed by, V. Baxter. Nimrod Houren suffered a judgment by default to go against him, which was duly confirmed, and from which no appeal has been taken. The other two defendants have filed a joint answer, setting forth a number of facts which it is unnecessary to notice, as they have not been supported by evidence, and which, had they been fully proved, would not have much aided their defence. Judgment having been rendered against them below, they appealed.

The judge, in our opinion, erred however, in allowing interest from the 7th of December, 1839. The note sued on was not protested at maturity, nor have the debtors been otherwise put in default before the inception of this suit; and there is no evidence of any agreement or promise on the part of the appellants to pay interest. The counsel for the appellee has called our attention to a statement made by one of the defendants' witnesses, 'that the plaintiff told him *that he was getting interest on this note.*' Admitting that under article 2895 of the Civ. Code, parol evidence could in any case be received to prove conventional interest, this testimony is nothing more than the declaration of the plaintiff himself, and is moreover extremely vague. If it were meant that the

plaintiff was from time to time receiving interest on this note, he is not entitled to receive it a second time. If the idea is, that interest was running in his favor on this note, it is not shown that it was by virtue of any promise made by the defendant.

It is therefore ordered that the judgment of the Commercial Court be amended, so as to bear legal interest only from the day of judicial demand, the plaintiff and appellee paying the costs of this appeal.

Cohen, for the plaintiff.

Wray, for the appellants.

THOMAS H. GORMAN *v.* S. E. BERGHANS and her husband.

An appeal, by a married woman, from a judgment rendered against her, taken in her name alone, and without being authorized by her husband or the court, will be dismissed.

APPEAL from a judgment of the Commercial Court, *Watts*, J.

Eyma, for the plaintiff, moved to dismiss the appeal, the defendant having taken the appeal and subscribed the bond without the authority either of her husband or of the court. Code of Pract. 105, 106. Civ. Code. 123, 1775, 1779.

Greiner, for the appellant.

MORPHY, J. This suit began by attachment on a note of hand for $475, drawn by S. E. Berghans, under the authorization of George Berghans, her husband, to the order of Jesse Strong, and by him endorsed over to the plaintiff. The general issue was pleaded; whereupon, judgment below having been rendered in favor of the plaintiff, the defendant appealed.

A motion to dismiss this appeal has been made, which, in our opinion, must prevail: the defendant, S. E. Berghans' petition of appeal is made in her name alone; she does not appear to have been authorized to prosecute this appeal either by her husband, or by the court. Code of Pr., art. 106. Civ. Code, art. 123.

Appeal dismissed.

The New Orleans Canal and Banking Company v. Nathan F. Comly.

Where property has been attached, on an affidavit that the defendant had left the State with the intention of never returning, his subsequent return will not alone be sufficient to dissolve the writ, where circumstances render it probable that his original intention was not to return; otherwise, where nothing suspicious existed, or where an intention to return was proved.

On a rule to show cause why an order of arrest should not be dissolved, in a case in which property had been previously attached, proof of the insufficiency of the property attached will not be on the plaintiff, where its sufficiency was not made a ground of the rule to quash the arrest.

The plaintiffs have appealed from a judgment of the District Court of the First District, *Buchanan*, J., setting aside a writ of attachment; and the defendant is appellant from a judgment, maintaining a writ of arrest.

F. B. Conrad, for the plaintiffs, contended that the court below erred in setting aside the attachment, citing *Grainer* v. *Devlin*, 1 La. 169; and decided correctly in sustaining the arrest. 7 Martin N. S. 525.

Soulé and *M'Henry*, for the defendant.

Martin, J. The plaintiffs are appellants from a judgment dismissing an attachment of the defendant's property, and appellees from one discharging a rule which the defendant had obtained, calling on them to show cause why he should not be relieved from the arrest of his person. The attachment was obtained on the usual affidavit, that the defendant had 'departed from the State, never to return;' and the first judge has considered his return since, as conclusive evidence of his intention to return when he departed; at least he has presented it to us as such in his judgment. It is true that the defendant has shown that he has been a resident of the city for about five years, and carried on business as a merchant; that during that time he has been in the habit of absenting himself every year during the sickly season, leaving an agent, or clerk to attend to his business. We feel no hesitation in saying, that if no suspicious circumstances existed, we should concur in the opinion of the first judge in dissolving the attachment; but the case of the defendant is that of a person charged with having, with the aid of one of the tellers of the bank, ac-

tually defrauded it of a sum of upwards of sixty thousand dollars, a circumstance which, in our opinion, removes every suspicion of an intended deviation from the truth in the president of the bank, who made the affidavit required by law. Notwithstanding this, if the defendant had made his intention to return evident, he would be entitled to relief; but the consequences he had to apprehend from the gross fraud he is charged with having committed on the bank, rendered his intention to avoid them by flight so probable, that the mere circumstance of his return does not totally destroy the presumption. Men often do that which they once intended not to do. By sustaining the attachment, the bank may possibly obtain a portion of the large sum of which they have been defrauded; by discharging it, the defendant will be enabled to defeat the ends of justice, so far as he is concerned. It appears to us that the rule ought to have been discharged. The object of the second rule was the relief of the defendant from the arrest of his person, obtained on a suggestion, supported by an affidavit, that the property attached was insufficient to secure the debt due to the bank, and that the defendant was about to depart permanently from the State, without leaving property. The defendant resists the plaintiffs' attempt on the grounds: 1st, that the allegations in the affidavit are untrue; 2d, that the object of the plaintiffs was to harass the defendant.

On the first ground, the judge informs us that the allegations are attempted to be disproved by the late return of the defendant to this State, and his forbearance to avoid his arrest after he had notice that an order had been issued therefor. To this, he has in our opinion, very correctly given no weight, and has considered the allegations of the parties supported by the following circumstances, to wit: that it is not shown that the defendant has any business which will require his continued residence here, nor that he has any other property with him. Lastly, the defendant's counsel urged that the plaintiffs ought to have shown the insufficiency of the property attached to discharge the debt. He relies on the case of *Ferguson* v. *Foster*, 7 Martin N. S., 521. The District Court correctly concluded, under the authority of that case, that as the defendant had not put the plaintiffs upon the proof, by making the previous attachment of sufficient property, a ground of

the rule to quash the arrest, the *onus probandi* did not lay on the plaintiff.

It is therefore ordered, that the judgment making the first rule absolute, be reversed, and that our judgment be, that the said rule be discharged, and that the judgment discharging the second rule be affirmed. The defendant paying costs in both courts, on each of the rules.

WILLIAM T. LENOIR and another *v.* J. KAIN and others.

A bond for a certain sum, with a condition that it shall be void, on the delivery by the obligors of a particular note, is a contract the principal obligation of which is the payment of the sum which it acknowledges to be due, subject to a resolutive condition, to wit: the surrender of the note.

THIS case was tried before the Parish Court of the parish of New Orleans, *Maurian*, J. The plaintiffs, forming the commercial house of Lenoir & Barnes, sue for the use of C. Alling & Co. They allege that having executed a note payable to the order of William Kain & Co., they were induced by the latter and the defendants, J. Kain & Stroud, and Duvivier & Woodlief, to pay the amount without a delivery of the note itself, on receiving from William Kain & Co., and the defendants, a bond payable in ninety days for a sum somewhat exceeding the amount paid, the condition of which provided that it should be void on the delivery of the original note of Lenoir & Barnes to their agents. They further aver that the note was never given up, either to themselves or to their agents; that at the time it was paid by them, it had been negotiated before maturity, which was unknown to them; that they have since been obliged 'to settle for and take up said note, in the hands of third persons, annexing it for reference;' and have in vain demanded payment of the bond of the defendants. The defendants answered by a general denial; Kain & Stroud further denying the authority of McCormick, who signed the bond as their agent, and Duvivier & Woodlief affirming that they only signed as securities of Kain & Stroud, and claiming to be discharged in case it should be decided that the latter were not bound.

Hoffman, for the plaintiffs.

T. Slidell, for the appellants.

BULLARD, J. This is an action against the defendants, as principals and sureties on a bond, by which they engaged to pay to Taylor, Gardiner & Co., as the agents of the plaintiffs, the sum of $2950 51. The condition upon which the payment was made to depend, as expressed on the face of the bond, was, that the obligors furnish and deliver over to the said Taylor, Gardiner & Co., a promissory note drawn by Lenoir & Barnes, payable to the order of Kain & Co., for $2753, which was duly protested. 'On the delivery of the said note to Taylor, Gardiner & Co. (says the bond), this obligation is to be surrendered, and to become void, otherwise to remain in full force and virtue.'

The defendants, Kain & Stroud, answered by denying the allegations in the petition, and especially that McCormick, who appears to have signed the bond as their agent, had any authority to do so. The sureties joined in this defence. The case was tried by a jury, and judgment having been pronounced upon their verdict for the plaintiffs, the defendants, Duvivier & Woodlief, have appealed.

This defence is clearly not sustained by the evidence. It is shown that the agent had authority to act; and indeed the only ground of defence disclosed by the pleadings, has not been insisted upon in argument.

But it is contended, that the plaintiffs have not shown enough to entitle them to recover; that the bond is not one for the payment of a sum of money, but substantially of indemnity to secure the plaintiffs against such damages as they may sustain by the non-delivery of the note mentioned in the bond, and that in effect it is so regarded by the plaintiffs themselves, who allege, in their petition, that they have since been obliged to settle for and take up their note in the hands of third persons, and that they have put the obligors in default by a demand in writing.

The bond sued on admits an existing indebtedness, and the obligors bind themselves to pay the amount thus admitted to be due, unless they produce and surrender to the plaintiffs a certain note. It appears to us that the principal obligation of the contract is the payment of the sum acknowledged to be due, subject to a resolutive condition, to wit: the surrender to the plaintiffs of their note. The consideration of the promise is expressed on the face of the bond, nor is it affected by an averment in the petition as to the origin or

nature of that consideration, especially when all the evidence in the record tends to show that it is true. The defendants cannot avoid the effect of that admission, we think, without showing that it was made in error, or that something has since occurred to discharge them.

But even admitting, that substantially the obligation of the defendants was to indemnify the plaintiffs, the measure of the indemnity would be the same, to wit, the amount of the note, which the defendants were bound to give up, and which is now produced by the plaintiffs themselves.

Judgment affirmed.

Succession of L. Charles Manson—James Walter Breedlove, Appellant.

Where the beneficiary heir is not of age, or resides out of the state, another person than his attorney in fact or that of his guardian may be appointed administrator; but the circumstance of the applicant's being such attorney, should not repel him, especially where there is no opposition.

Robert B. Woodworth applied to the Court of Probates for the parish of New Orleans to be appointed curator of the estate of L. Charles Manson, representing himself to be a creditor of the deceased. James Walter Breedlove opposed the appointment of Woodworth; denied that Woodworth was a creditor of the deceased; and prayed that he (Breedlove), as the attorney in fact of Levin J. Wilson, a resident of Mobile, and the husband of one of the children of said Manson, and guardian of the other, might be appointed sole curator of the vacant succession. There was a judgment, *Bermudez*, J., appointing Woodworth curator, and dismissing the opposition of Breedlove, with costs. The latter appealed.

Martin, J. In this court, Woodworth has withdrawn his opposition to the application of Breedlove, and also his own application to be appointed curator, and the case is submitted to us on Breedlove's application alone.

The latter claims the letters of curatorship on his statement that the intestate left two minor children as his heirs, one of whom is married to Wilson, who is guardian of the other. That the said Wilson and heirs reside in Mobile, and that he is the agent and attorney in fact in this state of Wilson, as representative of his wife, and guardian of the other heir. The opposition to the appointment of Breedlove, and the claim of the opponent to the curatorship being withdrawn, the application of the former ought to be sustained, unless the circumstance of his being the attorney in fact of the husband of one of the minors, and of the guardian of the other, renders the curatorship unnecessary. The Civil Code, art. 1035, provides that if the beneficiary heir be of age, and present in the state, he shall be entitled to the administration; from which we infer that if he be not of age, or out of the state, some other person may be appointed, rather than his attorney in fact, or that of his guardian. But the circumstance of the applicant being such an attorney ought not to repel him, especially when there is no opposition.

It is therefore ordered that the judgment of the Court of Probates be reversed, and that letters of curatorship be granted to the appellant; the appellee paying costs in both courts.

Rawle, for the appellee.

J. W. Smith, for the appellant.

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114 430.

The City Bank of New Orleans v. James Huie.

Privileges do not necessarily exist without registry; most privileges now existing by law, are required to be recorded, to operate against third persons.

Assessments made under the act of 2d April, 1832, regulating the opening and improvement of streets and public places in the city of New Orleans, are privileged as to third persons, only from the time of inscription in the office of the recorder of mortgages.

In the construction of a statute, effect must be given, if possible, to every part.

Appeal from the District Court of the First District, *Buchanan*, J.

Rawle, for the appellant. 1. The claim of the Municipality is

privileged, and of a higher rank than a mortgage; it should be paid by preference, at whatever time recorded. 2. The assessment being for the repayment of money expended in the improvement of the property, by which the mortgagee and the owner have been equally benefitted, the Municipality is entitled in equity to a preference. 3. The recording of the assessment was not necessary, the Municipality having a privilege from the nature of the case, and by the express provisions of the law. 4. The law is not unconstitutional. *Oakey* v. *Mayor et al.* 1 La. 1. *Dale* v. *M'Evers*, 2 Cowen 124.

R. N. Ogden and *A. N. Ogden*, for the Bank of North Carolina, and *L. Pierce* for James Armor, appellees. 1. The assessment was not duly recorded, the law requiring that the decree homologating the report should be recorded, which was not done. 2. Though regularly recorded, the mortgage exists only from the date of such record, which was subsequent to the mortgages of the appellees. 3. The case from 2 Cowen, 124, is inapplicable; it was decided under a law which provided 'that the assessment or tax for opening a street should, when imposed by the corporation, operate as a lien on the lots, overreaching all other incumbrances though prior in date;' 2. R. L. 499, sec. 37; and no such provision exists in the law under which the appellant claims. 4. No privilege can exist unless expressly granted by law. The present claim is analogous to those enumerated in arts. 2746, 2747, 3238, 3239, 3240, and 3241 of the Civil Code, all of which must be recorded to have effect.

Bullard, J. The sheriff having sold under execution, certain city lots belonging to the defendant, Huie, the Second Municipality of New Orleans having a lien or mortgage on the lots, resulting from an assessment for opening a street, under the act of 1832, took a rule upon other creditors of the defendant, to show cause why the sheriff should not retain in his hands the amount of their claim out of the proceeds of the sale, to be paid to them in preference to all other mortgages. This rule was at first made absolute as to all the parties, but was afterwards, by agreement, opened as to the Bank of North Carolina and James Armor.

The statement of facts shows, that the mortgage in favor of James Armor was recorded on the 8th of July, 1839, and

that of the Bank of North Carolina on the 23d of December, 1839; and that the lots in question were assessed according to the provisions of the act of 1832, in the sum claimed by the Municipality, and that on the 10th of October, 1840, the schedule of assessment against Huie was recorded in the office of the recorder of mortgages.

The District Court considering that these different mortgages were to rank according to the date of their registry, discharged the rule, and the Municipality has appealed.

The counsel of the appellant contends that its claim, under the assessment in virtue of the act of 1832, is privileged, and of a higher rank than a mortgage, and should be paid by preference, whatever may have been the time at which it was recorded.

The seventh section of the act, after directing in what way the assessment shall be made, provides, that 'the sums so assessed shall be a lien on the said lands and premises into whosoever's hands they may pass, *as a mortgage*, provided that the same shall be duly recorded in the office of the recorder of mortgages.'

The argument of the counsel would have great force, if all privileges necessarily existed without registry. But such is not the case. Most privileges now existing by law, are required to be recorded in order to operate against third persons. Publicity, if not of their essence, is necessary to give them that effect. That part of the statute which gives to the assessment the effect of a lien, is modified by the expression '*as a mortgage*,' and by the proviso, that the lien is subject to the condition of being recorded in the office of the recorder of mortgages. If we were to adopt the construction of the statute, contended for by the counsel for the Municipality, we should disregard altogether the proviso to the seventh section, contrary to the well settled rule of construction that effect must be given, if possible, to every part of a statute. We therefore fully coneur in the opinion given by the district judge.

Judgment affirmed.

Dominique Seghers v. The New Orleans Improvement and Banking Company.

Defendants purchased of plaintiff certain shares of the stock of a bank just incorporated, for which they bound themselves to pay a premium of so much a share, provided the institution should go into operation by a time fixed in the contract; the vendor finding that the bank could not go into operation unless an arrangement were made which required a reduction of the number of shares allotted to each subscriber, consented to such reduction, in consequence of which he was unable to deliver the whole number of shares he had contracted to furnish: *held*, that as the reduction was brought about by his own act, he was only entitled to recover the premium agreed upon, for the number of shares he was enabled to deliver.

Appeal from the District Court of the First District, *Watts*, J.

Seghers, propria persona, and *Eustis*, for the appellant.

Soulé, for the defendants.

Martin J.* The plaintiff sold to the defendants by a notarial act several lots in the city of New Orleans, for a fixed price, and two thousand and two hundred and sixty shares of the capital stock of the Citizens' Bank, secured by mortgage on said lots, for which the defendants bound themselves to pay a premium of five dollars per share, on the day on which the said bank should go into operation, provided it should do so within eighteen months from the date of the sale. It was further agreed, that on the bank thus going into operation, the defendants should apply the aforesaid premium to the payment of the sum of twelve thousand dollars of the stock of the defendants' company, for which the plaintiff had subscribed. The petition concludes by alleging that the Citizens' Bank went into operation within the period mentioned, whereby the defendant's became bound to pay the premium aforesaid, for which the plaintiff prays judgment, etc. The defendants pleaded the general issue, and admitted their purchase of the lots and stock, as stated in the petition; but averred that said stock was never delivered to them, though the plaintiff was regularly put *in mora*. Wherefore they claimed damages in reconvention. The jury gave the following verdict: 'We find that the plaintiff is entitled to a credit of twenty seven hundred and eighty dollars, being a premium of five per cent

* Morphy, J., being interested in the question, did not sit on the trial of this case.

on five hundred and fifty six shares of the stock of the Citizens' Bank, being all the number of shares we consider sold by the plaintiff and acquired by the Improvement Bank, under the contract between the parties.' The defendants made an unsuccessful attempt to obtain a new trial, and judgment was rendered according to the verdict. They appealed. The testimony shows, that soon after the contract sued upon was entered into, it became extremely doubtful at first, and certain afterwards, that the Citizens' Bank could not go into operation, unless the faith of the state were obtained for the payment of the bonds, by the sale of which the capital was expected to be realized. To obtain the faith of the state, it became necessary to re-open the books of subscription, and to reduce the number of shares originally subscribed for, in proportion to the accession of new subscribers. This the bank consented to, and by this operation the number of shares which the plaintiff had agreed to sell to the defendants was reduced from two thousand two hundred and sixty to five hundred and fifty-six; for which last number only the defendants obtained a certificate, whereby, they contended that the premium, to which the plaintiff was entitled, was reduced from $11,300 to $2780. The plaintiff's and appellant's counsel has contended in this court, that the judgment of the District Court has erroneously made him support a loss of the difference between these two sums, viz: $8520. He has urged that:

First, By the deed of sale, the contract was perfect. There was the thing sold, the price agreed upon, and the consent of the parties. Civ. Code, arts. 2414, 2431. Pothier, contrat de vente, Nos. 3, 31, *et seq.*

Second, The tradition or delivery of the stock took place in the very deed of sale before the notary public. The transfer of the stock was then and there made by the seller, accepted by the purchaser, and acknowledged by the Citizens' Bank. Thus the obligation of the seller was fulfilled. Civ. Code, arts. 2451, 2453, 2155.

Third, From that very period the thing sold, that is, the stock, was at the risk of the purchaser; and if it afterwards perished, either *in toto* or *in parte*, the loss was his. Civ. Code, art. 2442. Pothier, contrat de vente, No. 307.

Fourth, The payment of the price *only*, was subjected to a cer-

tain event, and this event having taken place within the limited time, the vendor is entitled to the payment of the price, even should the thing sold have perished since the sale. Civ. Code, art. 2442. Pothier, Contrat de Vente, Nos. 278, 279, 307. *Res perit domino, id est*, for the purchaser when the thing was transferred and delivered to him. Roman Code, lib. 4, tit. 48, leg. 12, and leg. 14.

The plaintiff and appellant also offered the following list of authorities: Merlin, Questions de droit, vol. 5, fol. 518, *verbo vente*, sec. 2, Edition de Paris, 1810, in quarto. Civ. Code, 2442. Acts of the Legislature of La., of 1833, p. 172, &c. Acts of 1836, p. 16, &c. This act was approved 30th January, 1836. The Improvement Bank voted on 2260 shares in March, 1836. The Citizens' Bank went into operation, 17th March, 1836. Acts of the Legislature of La., of 1836, sec. 9, p. 49.

The counsel for the defendant contends that the sale was on a suspensive condition, and the loss is to the vendor. Civ. Code, art. 2446. An incorporeal right was sold. Id., 2435. No title, enjoyment, or possession was given at the time. Id., 2457—77. Troplong on Sale, p. 169, No. 284. Code Napoleon, 228. Civ. Code, art. 2446.

The plaintiff refused to make any other transfer than that in the original act, in which there is no acceptance of transfer by the Citizens' Bank. His refusal put him *in mora*. The vendor is bound to deliver his title.

In reply, the counsel of the plaintiff has urged that the property sold was incumbered with the shares, *id est*, the price of the portion of the capital, which they represented. The plaintiff sold his portion of the subscription, and did not guarantee any number of shares. The vendor of any incorporeal right warrants its existence only. Civ. Code, art. 2416. On the bank going into operation, the stock rose fifteen per cent. The president of the Citizens' Bank intervened in the act of sale, and acknowledged notice of the transfer of the shares of that bank by the plaintiff to the defendants.

It appears to us, that the plaintiff is not entitled to relief at our hands. The sale of the shares was absolute, without any suspensive condition. The payment of the premium, however, depended on the happening of a contingency, to wit: the Citizens' Bank

going into operation within eighteen months. This contingency has indeed happened, but the jury have correctly concluded that as it was brought about by the act of the plaintiff, to wit: his consent to the re-opening of the books, the consequence of which has been the reduction of the number of shares purchased by the defendants to nearly a fourth, he cannot throw on them the loss resulting from the reduction of those shares.

Judgment affirmed.

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ÉTIENNE CARRABY v. NOEL BARTHELEMY LE BRETON, Curator.

The prayer of the petition determines the character of the action.

Where the petition makes it necessary to inquire into the title of the plaintiff, and to determine its validity, the action is a petitory one; and he must make out his title before the defendant can be disturbed.

ACTION before the Parish Court for the parish of New Orleans. The plaintiff alleges in his petition, filed in December, 1834, that he is the owner of certain lots of ground in the *faubourg* St. Mary, in the city of New Orleans; that some years before, when Jean Gravier was turned out of his residence by a sheriff's sale, he had given him permission to occupy an old wooden house standing on the above mentioned ground, in which he was allowed to reside until his death, in October, 1834, shortly after which the defendant was appointed curator of his succession. The petition further states that the said curator has caused the ground claimed by plaintiff to be put in the inventory of Gravier's property, and is about to cause it to be sold as such by the Register of Wills; and concludes with a prayer that the defendant 'may be decreed to restore the premises to the possession of the petitioner; to pay him rent therefor from judicial demand, till the delivery thereof; that, in the meantime, he be enjoined from selling or alienating the same; that the petitioner be decreed to be the lawful owner thereof; that the injunction be made perpetual; and for general relief.'

On a rule taken by the defendant, the injunction which had

been granted, was dissolved, on the grounds that the action was a petitory one, and that the plaintiff had not annexed any title to his petition in support of his allegation of ownership, as required by art. 174 of the Code of Practice, nor even alleged the existence of any such title. A supplemental petition was then filed, in which the plaintiff averred, 'that he was the owner of the property in contest, having acquired it from the late Antoine Carraby, by a deed of sale executed before a notary, on the 12th of May, 1828; that Antoine and Pierre Carraby, since deceased, purchased the property of Joseph, François, and Louis Bourgeois, by a deed of sale executed before a notary, on the 17th of March, 1818, of both which instruments authentic copies were annexed to the petition; that at the death of Pierre Carraby, Antoine Carraby became the sole owner of the premises under a compromise with the heirs of Pierre Carraby, executed before a notary, on the 29th July, 1826, and duly homologated by the Court of Probates; and that the Bourgeois acquired the property by purchase from Jean Gravier, by an act *sous seign privé*, of the 17th of November, 1812, recorded and deposited in the office of a notary, on the 18th of March, 1815, certified copies whereof are annexed to the petition.' It concluded with a prayer 'that a new injunction might be issued, restraining the defendant from selling or alienating the property in dispute, that it be made perpetual, and the plaintiff be declared the owner of the said property, and for general relief.'

The defendant's answer denied all the allegations of the plaintiff, except such as were specially admitted by him. It admitted that Gravier sold the lots mentioned in the petition to the Bourgeois, by an act, dated the 17th of November, 1812, and recorded in the office of a notary, the 17th of March, 1815, for a certain sum, the latter binding themselves to pay interest after maturity, on any part which should remain unpaid. That Gravier transferred this claim against the Bourgeois to Pierre and Antoine Carraby, by an act dated the 17th of April, 1814, and recorded in the office of a notary, the 18th of March, 1815. It averred that this transfer though apparently for a valuable consideration, was simulated, and devised for the purpose of placing the said claim beyond the reach of Gravier's creditors, and as collateral security to P. and A. Carraby for advances made to Gravier from time to time, on usu-

rious interest. That the Bourgeois having paid no part of the price, and wishing to be released from their purchase, proposed to Gravier to rescind the sale, to which he acceded; directing them to execute an act of sale of the lots to P. and A. Carraby; which was done by notarial act, on the 17th of March, 1818. That it was understood between Gravier and P. and A. Carraby, that the sale thus executed to them, was for the benefit of Gravier, and intended to effect the object contemplated by the transfer of Gravier's claim for the price of the lots to P. and A. Carraby, which was to place the property beyond the reach of Gravier's creditors, and to secure the Carrabys for their advances. That the latter had, for many years, large dealings with Gravier, similar to the transaction just mentioned, receiving simulated sales of property from him for the purpose of secreting it from his creditors, and for securing the repayment of advances made by them from time to time, with usurious interest. That the plaintiff, Etienne Carraby, was a party to many, and cognizant of all the said transactions, and well aware that Gravier was the real owner of the lots in dispute. That subsequently to 1824, in which year Gravier became absolutely insolvent, and as soon as the said Pierre and Antoine Carraby had discovered that he would never be able to redeem the property pledged to them for their advances, and for which they had simulated sales, they sold, for their own benefit, all except the lots in contest; which last they did not venture to dispose of from the fear of exciting the displeasure of Gravier, who had resided on them since the year 1823, and who might, in case of their being sold, have been led to take measures against the Carrabys to bring them to account for the illegal sales previously made by them. That Antoine, who had acquired all the rights of Pierre Carraby, when about leaving the state, made a simulated sale of the said lots, on the 12th of May, 1828, to the plaintiff, to enable the latter to make the best use of Antoine's pretended title, which circumstances might render practicable, without disturbing Gravier in his possession. The answer further alleges that neither Pierre nor Antoine Carraby, nor the plaintiff, has ever been in possession of the premises; that Gravier resided thereon, and had exclusive possession thereof from 1823 to the time of his death in 1834, and that he possessed them by himself, or his tenants, ever since they were

abandoned by the Bourgeois, and that the Carrabys, notwithstanding their pretended title, never claimed any rent therefor. It concludes with a prayer, that the ground may be declared to be the property of Gravier.

A second supplemental petition was filed, citing the curator of the estate of Antoine Carraby, the plaintiff's vendor, in warranty. The latter, in his answer, prayed that Louis Bourgeois, the only one of his vendors still living within the jurisdiction of the court, might be called in warranty to defend his title. Bourgeois averred that he acquired the property from Gravier, and that the defendant, his curator, is bound to warrant him against eviction.

The jury summoned for the trial of this case was discharged by consent, and the case was argued before the court alone, *Maurian*, J. The evidence established the fact of the sale by Gravier to the Bourgeois, on the terms and for the purposes stated in the answer of the defendant; the rescission of that sale; the subsequent transfer to Pierre and Antoine Carraby; the transactions between the latter and Gravier; the simulated sales for the purpose of securing their advances, and, in all probability, for the protection of the property from the creditors of Gravier. It was proved that these transactions took place between 1812 and 1824, during which period there were several settlements between the parties, in the last of which, on the 27th of December, 1823, Gravier, by an act *sous seign privé*, acknowledged himself indebted to Pierre and Antoine Carraby, in a balance of $13,277, for which he gave his note at one year, to bear interest at ten per cent a year from maturity if not punctually paid; that on the same instrument, the latter acknowledged that they held in their names the titles to eight tracts of land or other property worth about $30,000, really belonging to Gravier, but held by them to secure the payment of the note of the latter for $13,277, and interest, and costs in case of non-payment. The property now in contest, is mentioned as a part of that which P. and A. Carraby so held as security. In this act of settlement it was further agreed, that in case Gravier should not pay the note just mentioned, P. and A. Carraby should cause to be sold at public auction, after thirty days advertisement in two of the news-papers of this city, the property above mentioned, or

such part thereof as they might deem proper to sell, in order to pay themselves the amount of the note, with costs, &c.

It was proved that on the 2d of October, 1824, more than two months before the maturity of the note of $13,277, one of the pieces of property, the title to which was in P. and A. Carraby, having been seized and advertised by a creditor of Gravier, and the Carrabys having expressed their dissatisfaction, Gravier wrote them a letter, in which he 'authorizes them to dispose of the property mentioned in the agreement of the 27th of December preceding; to make such improvements thereon as they might think fit; to lease it, or even to sell it, his only desire being to terminate his business with them to their entire satisfaction.' In another letter, written the following day, the 3d of October, 1824, he accepts a proposition of their's, to take on their own account, at a certain price, two of the pieces of ground mentioned in the act of the 27th of December, 1823, merely requesting them, as the property is in their name, to give him a credit for the amount. There was no evidence of any dealings between Gravier and P. and A. Carraby subsequent to this period.

It was proved that the present plaintiff, Etienne Carraby, was acqainted with all the transactions between Pierre and Antoine Carraby and Gravier; that he knew under what circumstances the title to the property in contest was in the name of P. and A. Carraby; and that the act of the 27th of December, 1823, was in his hand writing. It was also established, that Gravier had inhabited and exclusively occupied the ground in dispute, from 1823 till his death in 1834; and that from the time of its relinquishment by the Bourgeois in 1818, Gravier had possessed it, either himself or by his tenants; that no rent was ever claimed by the Carrabys; and that during his possession Gravier exercised on the premises evident acts of ownership.

The judge of the Parish Court, after recapitulating the facts of the case, delivered the following opinion:

"The principal facts of the case having been established, it remains for the court to examine the principles of law applicable to them.

"1. What was the nature of the contract of the 27th of December, 1823, between Gravier and Pierre and Antoine Carraby? It

has been contended by the plaintiff's counsel, that it wanted one of the essential requisites of an *antichresis*, and I concur in that opinion; but it resembles that species of contract more than any other. It may, perhaps, be properly classed among the *pignorative* contracts. But whatever name we give to the contract, it was evidently the intention of the parties that the property of Gravier, the title to which was in P. and A. Carraby, should remain as security for Gravier's debt. That it was never contemplated that, in default of payment, they should become the owners of the property, is evident from the stipulation, that in case of the non-payment of Gravier's note at maturity, so much of the property as might be necessary should be sold; *at public auction, after thirty days notice, in two newspapers.*

"If the contract were an *antichresis*, Pierre and Antoine Carraby would have had no right to appropriate to themselves the pledge without complying with certain formalities, without which such appropriation would have been null. Code of 1808, p. 449, arts. 12, 15. Ib., p. 451, art. 25. Civ. Code, arts. 3132, 3135, 3148; and I cannot see upon what principle they can claim such a right under this contract. Even in case of a pledge, with an agreement that should the pledgor not redeem the thing pledged at the time fixed, the pledgee may sell the same in the manner stipulated in the agreement, the latter will be bound to notify the pledgor before doing so, and after such notice only will he be enabled to sell the thing pledged, and then only at public auction, in good faith, and without fraud, 2 Moreau & Carleton's Partidas, 890; and where these formalities have not been complied with, the owner may even claim the thing from a purchaser. 2 Ib., 896. In the case before us, there was a stipulation that if a sale took place, it should be at auction, after thirty days notice, in two newspapers.

"2. Was the contract of the 27th of December, 1823, varied or changed by Gravier's letter of the 23d of October, 1824? I think not. It is impossible to believe that the contents of that letter were to annihilate the only guarantee which Gravier had reserved to himself by the act of the 27th of December, 1823. There is nothing in that letter from which it can be inferred, that he intended to dispense with the sale by auction and the advertisements. But sup-

pose that such an inference could be drawn: it is clear that the property in dispute never was sold by Pierre and Antoine Carraby, who merely took it as their own, for it was subsequently found among the property of the partnership of Pierre and Antoine Carraby; and the title of Antoine Carraby, the plaintiff's vendor, is based alone upon his acquisition of Pierre Carraby's interest after the death of the latter, and on his own interest in their partnership.

"If any doubt could remain on the subject, it would be cleared up by Gravier's letter to Pierre and Antoine Carraby, of the 3d of October, 1824, which is, in fact, nothing more or less than a real sale of two of the pieces of property in question. Again, it is proved that all the property mentioned in the act of the 27th of December, 1823, except the premises now in dispute, was sold several years afterwards, and at public auction.

"3. If the property in dispute could not be considered, as before stated, to belong to Pierre and Antoine Carraby, it continued to be the property of Gravier. But had the former, who were the ostensible owners, having an authentic act in their name, sold to an innocent third person, there can be no doubt that the claim of the defendant would have been barred. Is the present plaintiff in the situation of an innocent third person?

"I think not. The full knowledge which he had of all the transactions between his brothers, Pierre and Antoine Carraby and Gravier, and the share which he had himself in those transactions, preclude such an idea. He was evidently acquainted with the nature, and consequently with the defects of the title.

"4. The act of sale from Antoine to Etienne Carraby, the plaintiff, though passed before a notary, is signed only by one witness, and has not, consequently, the character of an authentic act. It is no doubt good as an act under private signature, but has no effect against third persons; and with regard to Antoine Carraby and the plaintiff, the defendant is a third person. Civ. Code, art. 2417.

"5. The act of sale just mentioned, though passed since the act of the 20th of March, 1827, has not been registered; and has therefore no effect against third persons. 2 Moreau's Dig., 303, sec. 5.

"6. The defendant avers in his answer, that the sale from An-

toine Carraby to the plaintiff was a simulated one, and that the possession of the premises has never been in the latter; but that, on the contrary, as well before as after the said sale, it continued in Gravier. He alleges that the plaintiff is bound to destroy the legal presumption of simulation created by this circumstance; which he has failed to do. Civ. Code, arts. 1915, 3419.

"From the preceding statement, and from my view of the law applicable to the case, it follows, that the plaintiff, Etienne Carraby, is not the lawful owner of the premises claimed by him, and that the same never ceased to be the property of the late Jean Gravier, and now belongs to his succession, administered by N. B. Le Breton, the defendant. With regard to the successive calls in warranty, I consider that they must be dismissed. Etienne Carraby, the plaintiff, purchased the property in question from Antoine Carraby, with no other warranty than against the latter's personal acts; and being, as before stated, fully aware of all the circumstances connected with the title, and having been a party to all the transactions, he cannot, in my opinion, look to his vendor for warranty."

There was judgment in favor of the defendant, dismissing the petition, dissolving the injunction, and declaring the premises to be long to the succession of the late Jean Gravier. The plaintiff appealed.

Joseph Dumas, the dative testamentary executor of Antoine Carraby, and Louis Bourgeois, who had been cited in warranty, filed exceptions, in the appellate court, to the reconventional demand of the defendant, averring that it cannot be maintained, on the ground that the contracts on which it was founded were illegal, immoral, and contrary to public policy.

D. Seghers, for the plaintiffs and warrantors. The demand in reconvention cannot be listened to, being founded on an allegation of the respondent's own turpitude, and supported by contracts immoral, and contrary to public policy. *Allegans turpitudinem suam non est audiendus.*

Denis, and *Janin*, for the defendant. 1. The condition annexed to the contract, enabling the creditor to retain the property as his own, or to sell it, on the non-payment of the debt it was intended to secure, is illegal and void. 2 Tapia, 469. 16 Duranton, 444–5. Even by the regular contract of pledge, which is more favorable to

the creditor than the one under consideration, inasmuch as he has the possession of the property, such property can be disposed of only by judicial authority; Code of 1808, arts. 12 and 15, p. 448, and art. 25, p. 450.; Civ. Code, arts. 3132, 3135, 3146; and any agreement to the contrary is void. Under the old Spanish law, where an agreement was entered into authorizing the creditor to sell the property pledged if the debt was not paid, the sale was only valid, when made after notice and public advertisement. Partida, 5, tit. 13, law 41. 2 Moreau & Carleton's Partidas, 890. And where the property has been sold without these formalities, the debtor may recover it back. Ib., law 48, p. 896. The private sale of the property would therefore have been null, even had the agreement of the 27th of December, 1823, not expressly required thirty days advertisement.

2. The agreement of the 27th of December, 1823, was not altered by Gravier's letter of the 2d of October, 1824. The latter authorized the Carrabys to dispose of the property before the term stipulated in the contract, but not in a different manner. The intention of the parties is still further shown by the letter of the 3d of October, 1824.

3. Etienne Carraby, the plaintiff, is in the same situation as his brothers, Pierre and Antoine. He knew the character of their dealings with Gravier; and the agreement of the 27th of December, 1823, is in his writing.

4. The sale to the plaintiff, though purporting to have been executed before a notary and two witnesses, was signed by only one witness. It is a sale *sous seign privé*, which being neither recorded, nor followed by delivery, does not affect third persons. Civ. Code, arts. 2242, 2250, 2417. *De Flechier's Syndics* v. *Degruys*, 5 Martin, N. S., 423. And constructive delivery does not follow even an authentic act, where the property is in the hands of a third person. *Emerson et al.* v. *Fox et al.*, 3 La., 183.

5. The sale to the plaintiff, though subsequent to the creation of the office of the Register of conveyances, was not recorded there; which alone avoids it as to third persons. 1 Bullard & Curry's Digest, 603, sec. 82. *Carraby* v. *Desmare*, 7 Martin, N. S., 663. *Gravier* v. *Baron*, 4 La., 239.

6. The answer alleges that the sale from Antoine Carraby to

the plaintiff was simulated; and that as Gravier always remained in possession of the property, simulation must be presumed. Civ. Code, arts. 1915, 2456. *Monday* v. *Wilson*, 4 La., 340. The articles of the Code, above cited, place the burthen of proving the reality of the transaction, upon the party claiming under a sale not accompanied by possession. 8 Martin, N. S., 461. 3 La., 74. In this case no attempt has been made to offer such proof.

7. The evidence offered to show that Gravier denied or concealed his property, was received subject to all legal exceptions. The defendant objects to any parol proof of Gravier's acquiescence in any claim set up to his real property. *Nichol* v. *De Ende*, 3 Martin, N. S., 312.

8. Etienne Carraby, the plaintiff, has no better right than Antoine Carraby had. The illegality of the contracts between the Carrabys and Gravier was determined in the case of *Gravier's Curator* v. *Carraby's Executor*, 17 La. 132; and the principle on which that case was decided is equally applicable to the present. *In pari causa turpitudinis potior est causa possidentis.* The justice of the case is with the defendant.

9. This is not an action of jactitation. See the prayer of the original and supplemental petitions. The action of jactitation can only be instituted by the party in possession.

Bullard, J. The first question which is presented for our solution in this case is, what is the nature of the action; is it petitory, or possessory? By the plaintiff's counsel it is contended, that the proceeding is for the sole purpose of turning out of possession the tenant at will, whose possession was that of his lessor, or at most, an action in jactitation in which the defendant, who avers title in his intestate by way of reconventional demand, becomes *actor* and is bound to make out his title. The defendant, on the other hand, insists that the action is petitory, and that he is to be maintained in his possession, until the plaintiff shall have shown a better right.

It is the prayer of the petition, which gives character to the action. The plaintiff, after setting forth the fact of his ownership of the property, and that Jean Gravier had been permitted to occupy an old wooden house on the land until his death, and that the defendant, the curator of his estate, well knowing the premises, had caused the lot to be inventoried as a part of his estate, and had

refused to give up possession and surrender the key of the house. concludes by praying that the defendant may be condemned to restore the premises to the plaintiff's possession, and to pay rent at the rate of fifty dollars per month *from judicial demand;* that he be enjoined from selling or alienating the property; and that the petitioner *may be decreed to be the lawful owner* thereof; and the injunction be made perpetual; and for general relief.

It is manifestly impossible for the court to grant the prayer of this petition, and decree the property in dispute to belong to the plaintiff, without looking into his title, and deciding whether it be a valid one; and that is what we regard as of the essence of a petitory action. The plaintiff is therefore bound, in our opinion, to make out his title, before the defendant can be disturbed. It was in this light that the case was regarded in the court of the first instance. The respective titles of the parties were investigated, evidence offered and received without exception, and the court pronounced as upon a petitory action; and the judgment being for the defendant, the plaintiff appealed.

The case appears to be a part of the same tissue of usurious and illicit transactions, which were disclosed to our view in the case of *Gravier's Curator* v. *Carraby's Executor*, upon which we pronounced as our deliberate judgment, that the law did not authorize us to come to the relief of the parties against each other, and that *in pari delicto potior est conditio possidentis.* That the lot was originally the property of Gravier, is unquestionable. It only remains to inquire, whether he has ever been divested of it.

Whatever may have been the true character of the first sale from Gravier to the Bourgeois, it appears certain that the conveyance by the latter to Pierre and Antoine Carraby, was in substance a retrocession to Gravier, the Carrabys being regarded as merely persons interposed. This is satisfactorily shown by the fact that long subsequently, this property is enumerated as a part of that which the Carrabys held *en nantissement*, or as collateral security for advances made to Gravier by them, and which they were authorized by agreement in 1823, to sell in order to reimburse their advances.

Such being then the acknowledged condition of the parties in reference to the lot in dispute, it is clear that whether we look upon

the contract as one of mortgage, or of antichresis, the property could never have been vested in P. and A. Carraby without a sale, or at least some subsequent agreement between the parties. Code 1808, p. 449, art. 12, 15.

The evidence fully satisfies us that the present plaintiff, who purchased in 1828, was fully cognizant of the nature of the contracts between Jean Gravier and P. and A. Carraby, and that consequently, he must be regarded as identified with the latter, and as having acquired no better title than they had; and we concur fully in the able and lucid opinion pronounced by the Parish Court, being satisfied that the title of Jean Gravier never was legally divested, and that the property in controversy still belongs to his succession.

Judgment affirmed.

THOMAS DIXON *v.* NICHOLAS FORD and another.

Authority to an agent to settle or compromise a debt, does not empower him to bind his principal to defray the costs and incur the responsibility of collecting notes, offered to him in settlement by the debtor.

Defendant offered plaintiff's agent certain notes in the settlement of a debt due to his principal, and to guarantee the payment of any portion which could not be collected after suit, on condition that the latter would advance the expenses and assume the responsibility of their collection, and in the mean time suspend any proceedings against him. Plaintiff refused to assume the expense and responsibility of collecting the notes, but retained them as collateral security, and sued for the original debt: *Held*, that so long as he retained the notes, his right of action would be suspended.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

G. B. Duncan, for the appellant.

C. M. Jones, for the defendants.

MORPHY, J. This suit is brought to recover a balance of $18,621 10, due on an open account annexed to plaintiff's petition. The answer denies the indebtedness of defendants, and pleads the general issue. It further avers, that in 1838, there existed an un-

settled account current between T. Dixon and the said N. and E. Ford & Co.; and that in order to avoid litigation and obtain an extension of time to settle the same, the defendants agreed to secure to the said Dixon the amount now claimed, by transferring to him, without endorsement, certain promissory notes, with the understanding that the same were to be collected at maturity, by and on account of said Dixon, he engaging to use all legal measures and due diligence to recover from the makers, and to defray all costs and charges, and that in case of failure to collect their amount, the defendants were to be responsible for so much as might then remain unpaid. That the said T. Dixon accordingly received the said notes through his agent, S. C. Thwing, in New Orleans, together with the written guarantee of defendants for their ultimate payment under the conditions agreed on. That one of these notes has been placed for collection in the hands of attorneys residing in Mississippi, where they were all payable, and has been sued on for the use of said Dixon, who holds all the other notes assigned under the agreement, and has refused to return them. That, after a considerable lapse of time, he has offered to return only the guarantee, the terms of which formed the consideration for which said notes were transferred to him. That by said agreement, all indebtedness on this account current, if any ever existed, was extinguished, and a new contract created, which has never yet been rescinded and still exists, and upon which alone the defendants can be held liable by the said T. Dixon.

The case was laid before a jury; their verdict was, 'that the notes received by S. C. Thwing for plaintiff, were so received only as collateral security, and that plaintiff cannot sue until the insolvency of the collateral security debtors should appear.' Upon this verdict, judgment was rendered as in a case of non-suit, and the plaintiff appealed, after a fruitless effort to obtain a new trial.

This verdict is objected to, as having, it is said, neither form nor substance; as not responding to the issues presented by the pleadings, and as drawing from the only fact found by the jury a legal conclusion which it was not their province, but that of the court, to annex to their finding. It is urged, moreover, that the conclusion which they have drawn is not warranted by law, as the possession of collateral security does not bar the right of the cre-

ditor to sue on the primary or original debt. It is true, that from the language in which the verdict is couched, the latter part of it appears to be rather a legal deduction from the first fact found, than the finding of a distinct one, to wit: that the suspension of the right to sue was a part of the agreement between the parties. This we believe was the meaning of the jury, from the pleadings in this case, and from the charge of the judge, in which, so far as it goes, we can perceive no error, although its incorrectness was made one of the grounds of the motion for a new trial below. Having taken this view of the agreement, and evidence in support of it, the jury could not find absolutely in favor of the defendants. Had they done so, they would have apparently sanctioned the defence set up in the answer, that the debt had been extinguished by novation, a conclusion to which they had not really arrived. This verdict therefore, although somewhat informal, expresses their opinion on the facts of the case, and justified the non-suit entered upon it. From the evidence before us, we are satisfied that the settlement proposed by the defendants, and upon which they rely as an extinguishment of the present claim on the account, was never finally assented to either by Thwing or by the plaintiff. The former was, even in our opinion, without authority to accept it for his principal. His powers, it is true, were full and ample to effect an adjustment, settlement, or compromise in relation to the debt, but surely could not warrant him in making a contract which imposed on the plaintiff the duties of an agent, coupled with the burthen of defraying all the costs, and incurring the responsibility incident to the collection of the notes which the defendants offered to guarantee. Thwing appears to have been himself aware that he could not make such an onerous contract for his principal; for on receiving the guarantee and notes, he told the defendants, that he would submit their proposition to Dixon for his determination. This was not objected to by the defendants, who were afterwards duly advised of the plaintiff's refusal to accede to the proposed arrangement. Had the plaintiff then directed his agent to return the guarantee and notes, received subject to his decision, we see nothing that could have prevented him from suing forthwith on the open account; but the evidence shows that although the settlement submitted to him was rejected, the plaintiff returned only the deed

of guarantee, and retained all the notes as collateral security for the payment of his claim against the defendants, thus unfairly obtaining a security not intended to be given to him, and depriving the defendants of means out of which they might perhaps have raised funds to pay their debt. This, the plaintiff had clearly no right to do; the proposition should have been accepted, executed, or rejected *in toto*. The notes were not tendered as collateral security, but as a payment under certain terms and conditions; as long as they are retained, the plaintiff cannot sue for the debt in payment of which they were delivered to him.

Judgment affirmed.

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JEDEDIAH LEEDS and another *v.* JOHN CALDWELL and another.

The father of one of the parties, is incompetent as a witness for him.

A third person for whom certain articles were ordered, cannot be a witness for the defendant, in an action against the agent who ordered them.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Bradford*, for the plaintiffs. No counsel appeared for the appellants.

MARTIN, J. The defendants are appellants from a judgment, by which the plaintiffs have recovered the value of certain articles of machinery, made by the latter for the former. The plaintiffs' action was excepted to on the ground, that the defendants contracted with them for the said articles, on behalf of a third person, to wit, the father of one of the defendants. The exception being overruled, the defendants filed an answer pleading the general issue, and other matters. The case was tried by a jury, who found a verdict against the defendants, who made no attempt to obtain a new trial. Our attention is drawn to a bill of exceptions taken on the refusal of the judge to admit as a witness, the father of one of the defendants, on the ground of his being an ascendant, and interested in the cause, being the person for whom the articles were

manufactured. The court did not err, either of these grounds sufficed to repel the witness.

On the merits, the jury have found all the facts alleged by the plaintiffs, and the defendants did not manifest any dissatisfaction with their finding below. Nothing, in our opinion, justifies our interference in the case.

Judgment affirmed.

CHARLES A. J. BELOT *v.* JOHN DONNAVAN.

A witness may be admitted to prove that the date of a bond offered in evidence was a a clerical error, and to establish the real time of its execution.

THIS case was tried before the Parish Court of New Orleans, *Maurian*, J. It was proved that the plaintiff was thrown down and driven over by a dray, belonging to and in the employment of the defendant; and that the injury was not the result of mere accident, but the consequence of rapid and careless driving.

Preaux, for the appellee, submitted the case without argument. No counsel appeared for the appellant.

BULLARD, J. This is an action to recover damages for an injury received by the plaintiff, in consequence of being run over by the defendant's dray. He recovered two hundred dollars, and the defendant appealed. The case turns principally upon mere questions of fact; and on the merits nothing is shown which would justify our interference. There is, however, a bill of exceptions in the record, which we are expected probably to notice, although the case has been submitted by the appellant without argument.

It appears that on the trial, the plaintiff, in order to prove that the dray was owned by the defendant, and that he had a license to run it, according to the city ordinances, produced a license bond dated in 1836, and offered to prove that its proper date was 1837, within which year the injury was sustained; and the bill of exceptions was taken to the ruling of the court, by which that evidence was ad-

mitted. It was shown, as it appears by the same bill, that the bond was contained in a bound book, all the entries in which, both before and after the one in question, were in 1837, having been altered from 1836 in the printed form; and the evidence was in our opinion properly admitted to show that it was a mere clerical error or omission, more especially as a dray of the same number was actually employed during that year, and we are not to presume, nor could the defendant allege that it was running without any license, and in violation of the city regulations.

Judgment affirmed.

Succession of François Roboaum.

The validity of a decree appointing a dative testamentary executor, cannot be inquired into collaterally.

Where the bond given by an executor, on an appeal from a judgment rendered against him by a Court of Probate on the opposition of the heirs, purports to be executed in favor of the heirs only, but was intended in reality for the benefit of all entitled to receive any part of the assetts in his hands, and whose right to enforce payment was suspended by the appeal, it will enure to the benefit of all.

Appeal from the Court of Probates for the Parish of New Orleans, *Bermudez*, J.

Preaux, for the appellant.

Roselius, for the appellees.

Morphy, J. In 1836, Jacques Le Fort rendered an account of his administration as testamentary executor of the late François Roboaum. The heirs at law of the deceased filed an opposition to the same, on various grounds. Some of their objections having been sustained, the executor took a suspensive appeal, after executing a bond with Louis Ferrand, *fils*, as his surety, in the sum of eight thousand dollars. The judgment appealed from was affirmed in some particulars, and amended in others; so that the said J. Le Fort was finally condemned to refund to the succession a sum of $5,219 48. 12 La. 73. Shortly after this, J. Le Fort

absconded. The Court of Probates proceeded to appoint a dative testamentary executor, at the instance of one of the legatees of the estate, who suggested that Le Fort had left the country without paying his legacy and some of the debts set forth in his account. A. D. Doriocourt, the dative executor thus appointed, had a *fieri facias* issued against the former executor, to which a return of *nulla bona* having been made, he moved for and obtained a judgment against the surety on the appeal bond, pursuant to article 596 of the Code of Prac., Louis Ferrand, *fils*, appealed.

A variety of grounds were taken below by the appellant, in answer to the rule served upon him; of these, only two have been relied upon in this court, to wit:

1. That there was no room to appoint a dative executor, as the succession had been settled, and the account of the former executor finally homologated; and that the appointment, if proper, was illegally made, not having been preceded by public advertisement.

2. That the dative testamentary executor had no right of action on the appeal bond, it having been executed in favor of the heirs of Roboaum alone.

I. The decree appointing Doriocourt dative testamentary executor to the estate, has never been appealed from; its validity cannot be inquired into collaterally, as is attempted to be done here.

II. The bond purports to be executed, it is true, only in favor of the heirs of Roboaum, but as its amount covers not only their residuary interest in the succession as heirs, but also the claims of the legatees and creditors, whose right to receive or enforce payment was suspended by the appeal of the executor, it was no doubt done in their names, only because they were thought the most proper persons to represent the estate in opposition to the executor, whose account they had opposed. It was in reality intended for the benefit of all persons who, like them, were to receive a part of the assetts in the hands of the executor, and should enure to their advantage. 9 La. 25. The condition of this bond is, 'that J. Le Fort shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him,' &c. The judgment rendered was one amending the executor's account, and fixing his liability to the estate of Roboaum. This debt of the former executor, which is covered by the bond, must be recovered by the

dative executor who now represents the succession, in order to enable him to comply with the decree of the court, whereby the funds of the estate are to be distributed in accordance with the account as amended and homologated.

Judgment affirmed.

JACOB BRANDAGEE v. ANTHONY FERNANDEZ and another.

The production of a receipt for a part of the rent, is a sufficient corroborating circumstance to establish a verbal lease for any amount, previously proved by the testimony of one witness.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Roselius, for the appellants.

Josephs, for the plaintiff.

MARTIN, J. The defendants are appellants from a judgment, by which the plaintiff has recovered twelve hundred dollars for the rent of a store leased to them by his agent. The fact was proved by one witness only, and the defendants contend that there was no sufficient corroborating circumstance to support the testimony with regard to the second lease.

It was admitted that the rent from the 1st June, 1838, to the 1st November, was at the rate of $2700 per annum, and that after the 1st of November, it was at the rate of $2400 per annum. The receipts of the witness were produced by the defendants, at the rate of $2400 per annum. We concur in the conclusion, which the first judge drew from these circumstances, that the testimony of the witness, as to the second lease, was sufficiently corroborated.

Judgment affirmed,

Succession of Maxwell Sommerville.

Where the term has expired for which an executrix was appointed under a will admitted to probate in another state, and no evidence is offered of her re-appointment, she cannot be recognized as executrix by a Court of Probates in this state.

Mary Fulton Sommerville, styling herself testamentary executrix of the last will of her husband, Maxwell Sommerville, presented her petition to the Court of Probates for the parish of New Orleans, in which she alleged that duly authenticated copies of the last will of her husband, of the proof of its probate before the proper tribunal for the city and county of Philadelphia, and of the letters of executorship issued to her, had been presented to the court at a previous period, when the will was ordered to be filed and registered, and made executory, and a dative testamentary executor appointed, who entered upon the duties of his office, but subsequently applied for and obtained a discharge. The petition further states that there is a debt due the estate of the deceased in this state, for the recovery of which immediate steps should be taken; and it concludes with a prayer that the petitioner may be recognized as executrix, and may be authorized to act as such in this state.

The certificate of the register for the probate of wills and issuing of letters of administration in the city and county of Philadelphia, filed in the Court of Probates, showed: "That on the 24th day of November, 1836, at Philadelphia, before me was proved and approved the last will and testament of Maxwell Sommerville, late of Philadelphia, deceased, (a true copy whereof is annexed), having whilst he lived, and at the time of his death, divers goods, chattels, rights, and credits within the said commonwealth, by reason whereof the approbation and insinuation of the said last will and testament, and the committing the administration of all and singular the goods, chattels, rights, and credits which were of the said deceased, and also the auditing the accompts, calculations, and reckonings of the said administration, and absolute care of the same, to me are manifestly known to belong; and that administration of all and singular the goods, chattels, rights, and credits of the said de-

ceased, any way concerning his last will and testament, was committed to Mary Fulton Sommerville, sole executrix in the said testament named, she having first been duly affirmed, well and truly to administer the goods, chattels, rights, and credits of the said deceased, and make a true and perfect inventory thereof, and exhibit the same into the register's office at Philadelphia, on or before the 24th day of December next, and to tender a true and just accompt, calculation, and reckoning of the said administration on or before the 24th day of November, 1838, or when lawfully required, and also to diligently and faithfully regard, and well and truly comply with the provisions of the act relating to collateral inheritance." The original certificate was signed at Philadelphia, the 24th of November, 1836.

Bermudez, Judge of the Court of Probates, having refused to grant an order, recognizing the petitioner as executrix,

Wray, prayed for a mandamus to compel him to do so, citing 6 Martin, N. S., 622-3. 8 Ib., 236. 6 La., 690. 11 Ib., 573. 18 Ib., 570.

Garland, J. Mary F. Sommerville, widow of Maxwell Sommerville, deceased, a resident of the state of Pennsylvania, obtained a rule on the Judge of the Court of Probates, requiring him to show cause why a mandamus should not issue, to compel him to recognize her as the testamentary executrix of the last will of her aforesaid husband. With her petition, she filed a duly certified copy of the will, which had been regularly admitted to probate in the state of Pennsylvania, where she had duly qualified as executrix in the year 1836, for the space of two years, at the expiration of which time, or before, if it could be done, she was to render an account of her administration. It further appears from the admissions of the petitioner, that the will had already been duly registered and ordered to be executed, and that sometime past a dative testamentary executor had been appointed by the respondent, who for some cause, not apparent to us, had ceased to act as such, and had been discharged.

The Judge of the Court of Probates has presented a variety of reasons why a mandamus should not issue to compel him to recognize the petitioner as the executrix of the will, only one of which it is necessary to consider at present, which is, that the petitioner is

not now the executrix in Pennsylvania, and cannot be recognized as such in this state. An examination of the letters testamentary produced, shows that the petitioner qualified as executrix on the 24th of Nouember, 1836, and was compelled by the terms of the appointment to render a full and true account of her administration within two years after. It is thus conclusively shown that the term for which the petitioner was appointed has expired, and no evidence of her being continued or re-appointed has been exhibited; and that she has not been so continued is confirmed by the fact that when the will was first presented for registry and for an order of execution, a dative testamentary executor was appointed, which would not have been necessary, if the executrix named by the testator had been properly in the exercise of her functions.

The Judge of the Court of Probates was clearly right in refusing to recognize the petitioner as the executrix of the will of Maxwell Sommerville, deceased.

The rule is therefore discharged with costs.

1r 263
44 604
1r 263
113 149

Succession of Alexander Wedderburn.

Under the act of 28th February, 1837, the certificate of an American consul in any foreign country, is legal evidence of the attributes, official station, and authority of any civil officer in such country, under the laws thereof.

A non-resident executor is bound, like other executors, to administer the estate under the authority of the Court of Probates, to have an inventory made, and in all other respects to proceed according to law. The will under which he acts need not be again admitted to probate, having been once proved; the executor need not take a new oath, having been previously sworn; nor need he take out new letters testamentary; but new security will be exacted of him, under the act of 13th March, 1837, where creditors present themselves and require it.

Appeal from the Court of Probates for the Parish of New Orleans, *Bermudez*, J.

Garland, J. Elizabeth Julia Wedderburn, John Wedderburn, and George William Hope, residents of the kingdom of Great Britain, presented their petition to the aforesaid judge of the Court

of Probates, stating that they were the testamentary executors of the late Alexander Wedderburn, who died in the aforesaid kingdom, and annexed thereto a duly certified copy of an instrument purporting to be his last will and testament, in which they are named as executors, and which they say has been duly admitted to probate in the Prerogative Court of Canterbury in the city of London, and that they have been confirmed and recognized as such executors. It is further alleged that the aforesaid Alexander Wedderburn was never a resident of Louisiana; that he has no heirs, legatees, representatives, nor creditors therein, and no other property than about one hundred and sixty eight shares of the stock of the Louisiana and Louisiana State Banks, which, by the provisions of said will, are vested in them. They therefore pray that the judge 'will order the registration and execution of said will, in the form and manner pointed out by law.' This, the judge of the Court of Probates refused to do, saying that 'the documents annexed to the within petition, do not furnish sufficient legal proof of the fact that the will has been duly proved before a competent judge of the place where it was received, and that the judge ordered the registry and execution of the will.' Whereupon the petitioners presented their petition to this court, setting forth the facts, and asking that the judge of the Court of Probates be ordered to show cause why a writ of mandamus should not be issued, directing him to give an order for the execution and registration of said will.

The judge of probates, for answer, admits the application to him for the order of registry and execution of the will, but denies generally, all the other facts set forth in the petition; and he then goes on to deny specially, that Alexander Wedderburn is dead, that he ever made a will, that it was ever ordered to be registered and executed by a competent judge, that the petitioners are the identical executors of said Alexander Wedderburn, and have any interest in the premises, that the property situated in Louisiana consists in movables only, that there are no creditors, heirs, or legatees in the state, and avers that the petitioners are incompetent to prove the will being interested. He further says, that if the law of the place of execution of the will is different from that of the place where its execution is sought, it should be proved as a

fact, in support of the allegation that it was duly proved; and it should further be proved, that the will is clothed with all the formalities prescribed for the validity of wills, where it was made.

We shall not undertake to characterize this answer, or to give it the name it perhaps merits. The judge admits that it may 'be considered as too technical,' and avers that his object is to demonstrate that this court cannot exercise its appellate jurisdiction in the case. In this he is mistaken, and it is time for him to learn, if he does not know it already, that this tribunal is not to be deprived of its jurisdiction by technicalities, and by raising issues, not appertaining to the case, which ought, if there is any weight in them, to have been stated when the original application was made for the registration and execution of the will. Nor will legal cobwebs be sufficient to restrain us, from directing to the judges of the inferior courts the process authorized by law, 'commanding them to render justice and to perform the other duties of their offices, conformably to law,' Code Prac. art. 837, whenever a proper case is presented for our action.

The article 838 of the Code of Practice, tells us, that the writ of mandamus is given to enable this court to exercise its appellate jurisdiction; and in the case of *The State* v. *Bermudez*, 14 La. 479, it was so decided. This court cannot take cognizance of a cause in the first instance, but as soon as application has been made to an inferior tribunal, and it has acted finally, or refused to do so, then our powers commence, and we can revise the proceedings, upon the same state of facts and pleadings, upon which the inferior court acted; and the judge cannot by an attempt to raise issues, not made before him, oust us of our legitimate authority. To repeat the language of chief justice Marshall, it is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. 1 Cranch 175.

When we examine the proceedings in this case, we do not find the judge of the Court of Probates, when application was made to him to register and order the execution of the will, assuming the grounds he now does. If they constituted his real objections, he did not divulge them, or do any thing calculated to put the parties on their guard, or to give them an opportunity of obviating the

difficulties in their way. All that he then objected was that the documents did not furnish sufficient proof that the will had been duly proved before a competent judge of the peace where it was received, and that the judge had ordered it to be registered and executed.

We now take the case upon the petition and evidence, as acted upon by the judge of the Court of Probates. A copy of the will of Alexander Wedderburn is presented; it is certified by persons stating themselves to hold official capacities, and to be authorized to act in the premises. They show the probate of the will in the Prerogative Court of the province of Canterbury, in London, by its records; and the consul of the United States in London, certifies to the official character of these persons, and that full faith and credit are due and ought to be given to their acts 'in judicature and thereout.' This certificate is in conformity to the act of the legislature passed in 1837, and is legal evidence of the attributes, official station, and authority of the persons certifying. 1 Bullard & Curry's Dig. 822. We do not know in what way these documents can be made more authentic, and the certificates appended to them, show that they would be received as evidence in the courts in Great Britain.

As to the objection that Wedderburn is not dead, it is a well settled principle of law that no probate of a will can be granted until after the death of the testator, and the court must be satisfied of the fact, before ordering the registry and execution. Matthews on Executors, 36. But we are not left to presume the death in this case, as the fact is expressly stated in the documents.

As to the objections that no will was made, and duly ordered to be registered and executed, and touching the identity of the petitioners as the executors, the documents submitted to the probate judge, and now before us, contain ample proof to refute them. If there is any truth in public records, there cannot be a doubt upon the question; but there may be minds so inaccessible to conviction, as to refuse belief to the plainest proposition.

Whether the property is movable or not, or whether there are heirs, legatees, or creditors in the state, is not, in our opinion, very material, so far as it relates to the registration and order for the execution of the will. If the will be a good one, its effects upon

the property are regulated by law; and the rights of neither heirs, legatees, nor creditors, will be effected by the simple registry and order of execution. They remain the same, and if any injury is likely to result, all persons interested have a legal remedy to arrest it, or to obtain reparation; and when they present themselves, it will be time enough to listen to them.

As to the duty of the judge of the Court of Probates, in this case, we have heretofore expressed our opinion in more than one case, identical in all essential particulars. 17 La. 486. 18 La. 570. It is unnecessary to repeat the reasoning of the court, as the question can no longer be considered an open one.

As to the consequences of permitting the executors of foreign wills to administer in this state, the property confided to them by their testators, we anticipate none so serious or embarrassing, as the respondent and his counsel seem to apprehend. An executor is generally the confidential and trusted friend of the testator. He is in fact a species of agent, which the law allows a man to appoint for the purpose of administering his affairs after his death, and there is no more reason to believe that he will be unfaithful than any other mandatory; on the contrary, it is a fair presumption that he will be more faithful, as he takes an oath, and, in some instances, is required to give security for a faithful administration. A great amount of property belonging to non-residents, is controled and managed, bought and sold by agents and attorneys, and the supervision of the Court of Probates has not been found necessary for the protection of those interested, and we are not aware that any serious losses have resulted. But over the administration of foreign executors, the Courts of Probate maintain a supervision, as they are bound to administer under their authority as other executors are. The registry of a will, and the order to execute it, and the recognition of the executor named, are requisites to authorize an administration, and do not operate as exemptions from all control or responsibility. A non-resident executor is as much bound to have an inventory made, and otherwise to proceed in conformity to law, as a resident. The will under which he acts need not be probated again, because it has already been. The executor need not take a new oath, because he has already been sworn; nor take out new testamentary letters, for he has them already. If

creditors were to present themselves, and under the act of 1837, 1 Bullard & Curry's Dig. 500, require security to be given, it would be exacted.

Let the rule be made absolute.

Briggs, for the petitioners.

Succession of William Lytle.

A will may be presented for probate by any one having the custody of it, or interested therein.

One named as executor in a will admitted to probate in another state, and ordered to be registered and executed here, cannot, where no proof is offered of his having been qualified or recognized as executor, administer under it without further authority.

Garland, J. John K. Rayburn, a resident of New Orleans, has obtained a rule on the judge of the Court of Probates for the parish of New Orleans, requiring him to show cause, why a mandamus should not issue, directing him to register and order to be executed the last will and testament of William Lytle, deceased. He produces a certified copy of the will, with the probate thereof, from the records of the County Court of Davidson county, in the state of Tennessee; from which it appears that said Rayburn, and two others, are named as executors; and he alleges that there is property in this state to be administered. The judge has shown for cause, objections similar to those in the case of Alexander Wedderburn, *supra* p. 263, avowing his object to be the same as in that case; and he further shows as cause that the record is not properly authenticated, and that Rayburn has no interest under the will.

The copy of the will and probate is certified in conformity to the act of Congress, prescribing the mode in which public records and judicial proceedings in one state, shall be authenticated so as to take effect in another, approved May the 20th, 1790. As to the objection that the judge who certifies the proceedings, is not duly commissioned and qualified, and that proof of his capacity should

be submitted to the judge of the Court of Probates, it seems to us of the same captious character as many of the others. The courts of this state always respect the certificates and seals of the officers of a sister state, so far as to consider them *prima facie* evidence; and we take for granted, they attest what is true.

The fact that Rayburn is named executor in the will, seems to us sufficient evidence of interest, and authorizes him to ask for its registry and execution; but as to his acting as executor under it, without further authority, there seems to us an insuperable objection, which is, that it does not appear that he ever was recognized as executor in Tennessee, or ever qualified as such in any manner. A will may be presented for probate by any one having the custody of it, or being interested therein, and it may be duly proved and ordered to be executed; but that does not, of itself, show that the persons named as executors, have accepted or have been qualified according to law. We are clearly of opinion that Rayburn has no right to administer the property belonging to the succession of Lytle in this state, without further authority; and as he now asks only for the registry and execution of the will, we suppose he intends to take other legal measures to qualify himself.

The rule is therefore made absolute.

Claiborne, for the petitioner.

Succession of James Lally.

Garland, J. Robert Splain, a resident of this state, presented his petition to the judge of the Court of Probates for the parish of New Orleans, together with a duly certified copy of the will of James Lally, deceased, which had been admitted to probate, and ordered to be executed in the state of New York. This order the judge of the Court of Probates refused to give, and the petitioner obtained a rule on him to show cause why a mandamus should not issue, commanding him to admit said will to registry and execution. The respondent has assigned various reasons why the writ should

not be issued, all of which have been stated in the cases of Wedderburn and Lytle, *supra* 263, 268, and this case differs from the latter only in the particular, that Splain, the petitioner, is not named executor, nor does it appear that he is an heir, legatee, or creditor; but he swears that he has an interest in having the will registered and ordered to be executed. We see no reason why this should be refused, as it gives the petitioner no right to administer upon the property, without further authority, which we presume he intends to solicit. It may, on various grounds, be important for him that the will should be registered and made executory, and no injury can be done to the succession by so doing, and thereby preserving it, and enabling all having an interest to use it as a muniment of title, or as evidence in relation to the property situated in this state.

This case is so nearly similar to that of Rayburn in the succession of William Lytle, deceased, that the same judgment must be rendered.

The rule is therefore made absolute.

G. B. Duncan, for the petitioner.

Succession of Samuel Farmer.

Garland, J. This is a rule, taken on the respondent, the judge of the Court of Probates for the parish of New Orleans, to show cause why a mandamus should not issue, compelling him to register and order the execution of the will of Samuel Farmer, deceased, who died in Great Britain, owning some bank stock in this state. The case is in every material feature similar to that of the executors of Alexander Wedderburn, *ante* p. 263, which has been just now decided, and we have come to the same conclusion in relation to it.

The rule is therefore made absolute.

Benjamin, for the petitioners.

Succession of Peter Robert Venable Hinde.

Garland, J. William Whittington and Louisa Anna Hinde, the executors of the last will and testament of the Rev. Peter Robert Venable Hinde, have applied to us for a rule on the judge of the Court of Probates for the parish of New Orleans, to show cause why a mandamus should not issue to compel him to receive and register, and order to be executed, the last will and testament of the aforesaid Peter R. V. Hinde. The judge showed the same cause as in the cases of Wedderburn, *ante* p. 263, and Farmer, *ante* p. 270, and the case is, in all material points, similar to them. We therefore have come to the same conclusion.

Let the rule be made absolute.

Benjamin, for the petitioners.

John D. Cordes, Curator, v. Charles Clarke.

A Court of Probate may order the sequestration of papers belonging to a succession, administered under its authority, when unlawfully retained by a third person.

Appeal from the Court of Probates for the parish of New Orleans, *Bermudez*, J.

Eggleston, for the appellant.

E. L. Lewis, for the plaintiff.

Garland, J. The plaintiff avers that he is the curator of the vacant succession of Otto Tienken; that a short time after the death of the latter, the defendant took from a trunk which belonged to the deceased, various title papers, notes, receipts, and other documents, which he retains and refuses to deliver to him. It is further averred, that the documents and papers are necessary to enable the plaintiff to administer the succession, and to render his account thereof. The documents were sequestered at the instance of the plaintiff.

The defendant excepted to the jurisdiction of the court, but his plea being overruled, he denied generally the allegations contained in the petition. Judgment was rendered against him, and he appealed.

The plea to the jurisdiction of the Court of Probates is the only question upon which the opinion of this court is asked by the defendant, as on the trial he admitted that he had the papers in his possession.

We think the Probate Court did not err in maintaining its jurisdiction. The article 1037 of the Code of Practice gives that court authority to issue writs of sequestration, and other process, for the purpose of enforcing its jurisdiction, and enabling those acting under its authority to perform the duties required by law; and among other purposes for which such writs may issue, one is 'to compel parties or other individuals to produce title deeds, papers, or other objects which may be in their possession.' The petition does not set up any question of title to be decided by the court, but claims the production and delivery into court of documents and papers alleged to be necessary, important, and useful in the settlement of a succession, now in a course of administration.

Upon the merits, we see no error in the judgment.

Judgment affirmed.

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1 r 272
46 1356

Auguste Bijotat v. His Creditors.

The compensation allowed to counsel appointed to represent the absent creditors in cases of insolvency, is in no case to be paid by the mass of creditors. The act of 1817, which provides that such compensation shall be at the rate of five per cent on the amount recovered for the absent creditors, to be deducted from such amount, and that it shall not exceed the sum of two hundred and fifty dollars, is not repealed by the 3164th article of the Civil Code.

In all cases where compensation is to be computed by a *per centage*, and no sum is realized by which it is to be borne, the compensation fails.

Appeal from the Parish Court for the parish of New Orleans, *Maurian*, J.

MARTIN J. Paul Longis, one of the creditors, is appellant from a judgment overruling his opposition to a charge of one hundred and fifty dollars on the tableau, as a compensation to the attorney of the absent creditors. His counsel has urged that the act of 1817 provides that 'the fees of the counsellors who shall be appointed on behalf of the absent creditors, shall in no case be paid by the mass of creditors, but shall be levied on the amount of the sums which shall be recovered for the account of the said absent creditors, at the rate of five per cent; provided, that in no case the fees allowed to the counsellors appointed on behalf of the absent creditors shall exceed the sum of two hundred and fifty dollars.' The counsel for the appellees has contended that this part of the act has been repealed by the Civil Code, art. 3164, which directs that 'the costs of affixing seals and making inventories for the better preservation of the debtor's property, those which occur in cases of failure or cession of property, *for the general benefit of creditors*, such as fees to lawyers appointed by the court to represent absent creditors, commissions to syndics, and finally, costs incurred for the administration of estates, which are either vacant or belonging to absent heirs, enjoy the privileges established in favor of law charges.' The Parish Court has thought, with the latter counsel, that the part of the act of 1817 referred to, was repealed, and accordingly has overruled the opposition, it appearing to him that the compensation on a *quantum meruit* was reasonable, although there was not any thing coming to the absent creditors. In our opinion he erred. The Code declares, indeed, that the fees of the attorney of the absent creditors are among those which are for the general benefit of creditors. From this declaration it may be perhaps contended, that as those fees are for the general benefit of all the creditors, they are not to be borne by a part of them; and thus the absent creditors ought to be relieved from part of the burden which the act of 1817 imposed upon them. It is useless that we should now express any opinion on this point. The legislature thought proper, in 1817, to direct that the compensation of the attorney of the absent creditors should not be settled on a *quantum meruit*, but computed by a per centage. It does not appear to us that it was the intention of the legislature to alter this, by the part of the Code referred to. The compensation is still to be a per centage, which cannot be computed

on the total amount of the sum coming to all the creditors, but only on the amount of those coming to absent creditors. In the present case, there is nothing coming to those creditors, and it is urged that as the attorney is to be without a compensation, a new rule ought to be adopted, to wit, relief on a *quantum meruit*. This the legislature has not thought proper to direct. In all cases where compensation is to be computed by a per centage, and there is no sum by which this per centage is to be borne, the compensation fails. Between the year 1817 and the promulgation of the Code, it does not appear that there was any difficulty in obtaining members of the bar to represent absent creditors in a failure, although the compensation allowed by law was precarious. Nothing shows that the legislature had any thought of changing the law, for the purpose of enabling the courts to find with more facility attorneys to represent such creditors. Gentlemen of the bar when appointed in attachment cases, to represent the absent defendant, are allowed by the court a fee to be paid out of the property attached when the plaintiffs obtain judgment, *id est*, when they lose the case in which they are appointed to protect the defendant. No allowance is made to them if their labor is crowned with success. Attorneys appointed by the court to represent the interests of absent creditors in a case of failure, or absent debtors in attachment cases, run a chance for their fees; but as no one is bound to accept such appointments, those who take them cannot complain, if the case in which they engage turns out to be one of those in which the law has provided no compensation for their labors. A sheriff may be at great trouble in endeavoring to execute a process, and still be without compensation, if notwithstanding his utmost exertions, he is unable to execute it.

It is therefore ordered that the judgment be reversed, and that the opposition of the appellant be sustained, and the charge of $150 on the tableau for the compensation of the attorney of the absent creditors be stricken out; the costs to be paid in both courts out of the estate surrendered.

Castera, for the appellant. No counsel appeared for the appellees.

1r 275
125 202

Henry Forsyth and another v. Louis René Gaiennie and another.

Appeal by the defendants from a judgment of the District Court of the First District, *Buchanan*, J.

Wharton, for the plaintiffs, submitted the case without argument. No counsel appeared for the appellants.

Morphy, J. The certificates of the clerk and judge show that the record before us does not contain all the evidence, and there is no bill of exceptions, statement of facts, or assignment of errors.

Appeal dismissed.

Case 2.
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1r 275
51 129

Joachim Kohn, Syndic, and others v. John C. Wagner and another.

The syndic of the creditors of an insolvent cannot appeal from a judgment, establishing the privileges of the creditors with regard to each other. The estate is not aggrieved by such a judgment; it affects only the individual rights of the creditors.

After issue joined, suitors are presumed to be always in court, attending to their business, either in person or by their counsel, and are consequently bound to notice the steps taken in their cases.

This action was instituted before the District Court of the First District, *Buchanan*, J., by 'Joachim Kohn, syndic of Louis Bouligny,' Mary Hampton, and others, against the defendants. The petition of appeal and the appeal bond are in the name of 'Joachim Kohn as syndic of the creditors of Louis Bouligny.'

McHenry, for the defendants. No counsel appeared for the appellant.

Morphy, J. J. C. Wagner & Co., judgment creditors of the insolvent, made opposition to the tableau of distribution filed by the syndic, claiming to be paid in preference to Wade Hampton, the succession of D. Bouligny, Samuel Kohn, and L. Millaudon, who were therein set down as creditors by special mortgages. This

opposition was sustained by the judge, no evidence whatever having been adduced, although called for by the opponents, in relation to the mortgages of these persons. The present action was then brought by the syndic, and those mortgage creditors, to annul the judgment sustaining the opposition. They allege that the opposition of J. C. Wagner & Co. should have been served upon them, but that in fact it never was so served; that Wade Hampton was dead previous to the filing of said opposition, and that consequently his heirs should have been made parties, which was not done; and that in the absence of all parties concerned, a judgment was rendered in favor of the opposing creditors, which they pray may be annulled. J. C. Wagner & Co. pleaded the general issue, and prayed for a trial by jury. The plaintiffs having failed to make any proof in support of their action, a judgment of non-suit was pronounced, from which J. Kohn alone, in his capacity of syndic, has thought proper to appeal. The creditors, whose mortgages were postponed to that of the appellees, and who were plaintiffs in this suit, having acquiesced in the judgment of the inferior court by not appealing from it, the right of the syndic to prosecute this appeal may well be questioned. The estate which he represents is not aggrieved by the judgment appealed from; it affects only the individual rights of those creditors whose place on the tableau was disputed, and it must be a matter of complete indifference to the syndic, whose mortgage, among different creditors opposed to each other, is declared to have the preference. In conflicts of this kind, the syndic is without interest, and should not interfere, especially when, as in the present case, there is nothing coming to the ordinary creditors. But as this syndic is himself one of the creditors whose mortgage is affected, he may perhaps be considered as litigating before this court in his own right, although in strictness he should have expressly averred his intention to do so.

The only point made by the appellant, is that the case should be remanded, because it had been improperly set for trial on the court docket, when a jury had been called for by the defendants. The record shows that the case came on for trial before the court, on the 21st of April, 1840, that it was tried *ex parte*, and that the judge took it that day under consideration; that on the 18th of

May, the parties, by their counsel, waived the trial by jury; and that the judgment of the court was pronounced on the 3d of June following, and an appeal taken on the 20th of the same month. No effort appears to have been made below to obtain a new trial, on the ground of any error or surprise, or of the *ex parte* hearing of the cause. We are not to believe that the consent to waive the jury, was entered into in entire ignorance of the proceedings had in the matter up to that time. Suitors are bound to notice the steps taken in their causes, as after issue joined they are presumed to be always in court attending to their business, either in person or through their counsel. In the absence of any affidavit to the contrary, this waiver of the jury appears to us to have been intended to cure the irregularity with which the case had been set for trial, the plaintiff being willing to take his chance before the court, who had the case under advisement, rather than undergo the delay which must have attended the reinstatement of the case on the jury docket, where it had been placed at the prayer of the defendants.

Judgment affirmed.

William M. Beal v. C. P. Alexander.

Property attached is not represented by the bond given for its release; nor can the question of ownership be examined after it has been bonded.

A rule against the sureties in a bond for the release of property attached, to make them responsible where the judgment has not been satisfied, is, under the act of 20th March, 1839, to be tried summarily and without a jury, unless the defendant alleges under oath that the signature is not genuine, or that the judgment has been satisfied.

Nugent, Turpin, and Watt, are appellants from a judgment rendered against them by the Commercial Court of New Orleans, *Watts*, J., as sureties of the defendant in an attachment bond. Their signature to the bond was not denied, nor was their any allegation that the judgment against the defendant had been satisfied.

Hoffman, for the plaintiff.

T. Slidell, for the appellants.

MARTIN, J. A number of bales of cotton having been attached in this case in the hands of Nugent, Turpin, and Watt, who were summoned as garnishees, they bonded them, and judgment was afterwards obtained against the defendant. The plaintiff, on exhibiting a writ of *fieri facias* issued on the judgment, with a return of *nulla bona*, and also the bond taken by the sheriff on releasing the cotton, in which the garnishees were sureties for the defendant, obtained a rule on them to show cause why judgment should not be entered against them as sureties on the bond. The sureties, in showing cause, referred to the answer which they had made in this case as garnishees, and averred that they were not liable to the plaintiff unless the defendant was owner of the cotton attached, which they denied. But if the court thought otherwise, they answered that the net proceeds thereof was only $4992 66, and that they are entitled to a deduction of $1000, and interest on the plaintiff's note in their favor. They prayed for a jury.

In their answer as garnishees they denied that they had in their possession any property of the defendant, unless he was the owner of two hunered and eight bales of cotton claimed by Chisholm and Minter, of Mississippi.

The court making a deduction of the amount of the plaintiff's note to the sureties, gave judgment against them on the bond for $3967 66, and they appealed. Their counsel has drawn our attention to a bill of exceptions taken to the opinion of the court, rejecting evidence which they offered to show that the cotton attached was not the property of the defendant, but that of Chisholm and Minter; and to another bill to the opinion of the court refusing to allow a trial by jury. Chisholm and Minter intervened in the original suit, and judgment was given against them simultaneously with that against the defendant. From both these judgments appeals are now before us. The present appellants were endeavoring to bring the question of property in the cotton before the court, in the same manner as they might have done if the cotton had not been bonded, contrary to the opinion which we have expressed that the property attached is not represented by the bond given for its release. 18 La., 57.

The court therefore did not err in rejecting the evidence.

Under the act of 1839 the present is a summary case, and the trial by jury was properly refused.

Judgment affirmed.

THE FIRST MUNICIPALITY OF THE CITY OF NEW ORLEANS v. THE COMMISSIONERS OF THE GENERAL SINKING FUND, and others.

The First Municipality has not succeeded to the rights and privileges of the inhabitants of the old city of New Orleans, nor to those of the corporation created by the act of the 17th of February, 1805, and the acts supplementary thereto. It is the creature of the act of the 8th of March, 1836; and to it, and the acts amending it, we must look for its powers, and rights.

The corporation of the city of New Orleans, which existed previously to March, 1836, is in a state of liquidation, and is represented in all things relating to its settlement and rights by the Mayor and the Commissioners of the Sinking Fund. The real property which belonged to it at the time of its dissolution, belongs to the Municipality in which it is situated.

ACTION before the Parish Court of New Orleans, by the First Municipality, against the Commissioners of the General Sinking Fund, and the Second and Third Municipalities of the city of New Orleans. The petition prays that the proceeds of the sale of certain lots, situated between Ursuline, Levée, and Garrison or Barrack streets, and the public road, and between Custom House, Levée, and Bienville streets, and the public road, originally forming a part of the public quays, extending along the front of the city between the first row of houses and the river Mississippi, which by an act of the Legislature of the 11th of March, 1836, were directed to form a part of the general sinking fund of the city, and the interest to be applied to the payment of the debts of the former corporation, may be decreed to belong exclusively to the inhabitants of the city proper, or old city of New Orleans, within the limits which it had from its foundation by the French to the time of the passage of the act entitled an act to incorporate the city of New Orleans (17 Feb., 1805,), and that the petitioners may be declared to be entitled to the interest which has accrued on the same. The

petition further prays that the property which before the cession of Louisiana to the United States, belonged to the city of New Orleans, as commons, may also be decreed to be the exclusive property of the petitioners; and that a piece of ground between New Levée, Common, Tchapitoulas, and Canal streets, with the alluvion in front thereof, and another between Tchapitoulas, Common, Magazine, and Canal streets, both of which by the act dividing the city into Municipalities had been arbitrarily given to the Second Municipality; and the proceeds of the sales made by the former corporation of New Orleans of certain lots between Common and Canal streets, and the rents which may have accrued thereon since the division of the city into Municipalities, may in like manner be declared to be the property of the inhabitants of the old city of New Orleans; the two pieces of ground just mentioned, and the lots sold between Common and Canal streets, having formed part of the commons, which prior to and at the treaty of cession, belonged to the city of New Orleans as it then existed.

The defendants severed in their answers, setting up various defences.

The judge of the Parish Court, after recapitulating the facts of the case, pronounced the following judgment:

"After a great deal of argument by the contending parties, and after reflecting maturely on the whole, as well as upon the evidence, I feel satisfied:

"1. That the grounds either in kind, or represented by their proceeds, which are claimed in this suit from the Second Municipality, were part of the commons given or granted to the city of New Orleans by its founder.

"2. That the grounds, the proceeds of which are claimed from the sinking fund, were likewise part of the quays and commons thus granted.

"3. That the former city of New Orleans, as it was originally established, was the exclusive owner and proprietor of all the said commons and quays.

"4. That after receiving them as grants or gifts, the said city of New Orleans could not be legally deprived thereof, either by the prince who granted them, or by any of the governments which have succeeded to that prince.

"5. That any law by which the city of New Orleans, as originally created, should be deprived, without indemnity, of any of the commons granted to it by its founders, would be in derogation of the constitutional principles that no one can be deprived of his property without a proper indemnification, and that no law ought to be passed impairing the obligation of contracts.

"If therefore the *city of New Orleans*, I mean the city as originally founded under the French crown, and to which the commons and quays in question were given, were the plaintiffs in the present case, I should at once say they must recover those commons or quays; and that any law by which they may have been deprived of them was unconstitutional, and as such null and void.

"But who is it that sets up the claim to be the *old original city of New Orleans?* I am answered by the plaintiffs, 'the First Municipality.' Is it really so?

"What is the First Municipality? It is one of the three corporations, created by the act of March 8th, 1836. It is one of the three parts into which the former corporation of New Orleans, created by the act of 1805, was divided. As a corporation, it has no other rights nor powers than those given to it by the act of March 8th, 1836. It is the creature of the Legislature. It represents only that territory which the Legislature declared it should represent. No where do we find that the First Municipality is substituted to, or intrusted with, the rights of the original city of New Orleans.

"Even in point of extent or territory, the First Municipality is not the same thing as the *original city of New Orleans*. On each side, up and down the river, it has less extent; for on the upper side it extends only to the middle of Canal street, whereas the original city with its commons went as far up as the Jesuits' plantation, now the upper side of Common street; on the lower side it extends only to the middle of Esplanade street, whereas the original city extended with its commons beyond the lower side of Esplanade street, as far down as the neighboring plantations. Again, in the rear, the First Municipality extends to, and includes the settlement of the bayou St. John, whereas the original city of New Orleans, with its commons, did not by far extend so much in the rear.

"Thus it appears that the Second Municipality on the upper side,

and the Third Municipality on the lower side, include, by the act which incorporates them, parts of the original city of New Orleans. The First Municipality, it is true, includes a much more considerable portion of the original city of New Orleans, than either the Second or Third Municipalities, but for all that, I cannot conceive how it can pretend to be the original city itself.

"The present action is, or at least partakes much of the character of a petitory action. In such an action, the plaintiff must succeed upon the strength of his own title, and not on the weakness of his adversary's.

"If the First Municipality cannot, as I conceive, be considered as standing in the shoes of the original city of New Orleans, it cannot, in my opinion, be sustained when it revendicates the grounds, or the proceeds of grounds lying within the Second Municipality, although the same belonged to the original city of New Orleans.

"With regard to the claim of the First Municipality against the Sinking Fund, the question appears to me somewhat different.

"By the act of the 8th of March, 1836, dividing the former corporation of New Orleans into three distinct municipalities, it is provided, sec. 15, 'that all the real property, of whatever kind or description, and the revenues arising therefrom, now vested in the Mayor, Aldermen, and Inhabitants of New Orleans, shall be vested in the respective municipalities in which the same is situated.' The lots of ground, the proceeds of which are claimed by the plaintiffs from the Sinking Fund, are all situated in the First Municipality, therefore, according to the provision just recited, the said lots of ground were vested in the First Municipality. But at the time the law was passed, those lots of ground being the object of a suit between the United States and the corporation of New Orleans, were sold by consent of all parties concerned; the rights of the parties to be exercised on the proceeds, instead of on the property itself; in other words, the proceeds representing the property. These proceeds were deposited in court, when by the act of March 11th, 1836, it was provided:

"'Sec. 1. That in addition to the stock and other funds designated by the fifteenth section of the act to which this is a supplement, (*the act of March 8th*, 1836,) to form a sinking fund for the

payment of the debts of the city, as set forth and described in the said section, the monies arising from the sale of the lots in front of the city proper, comprised between Canal and Esplanade streets, and the front street of the city and the river, and which lots have been sold pending the litigation relative to the title thereto between the United States and the Mayor, Aldermen, and Inhabitants of the city of New Orleans, and which proceeds now remain deposited in the District Court of the United States for the Eastern District of Louisiana, the net amount thereof, deducting all costs and charges, shall, in case of judgment being rendered against the title of the United States thereto, be and form a part of said sinking fund, and *the interest thereof* be applied in the same manner as the other funds of said sinking fund, for the payment of said debt.'

"Since the act last recited, the judgment contemplated has been rendered against the title of the United States, and the moneys arising from the sale of the lots in question have been delivered to the Sinking Fund, and the capital and interests of those moneys are now claimed by the plaintiffs.

"Here the question arises whether that provision of the first section of the act of March 11th, 1836, is constitutional?

"In the first instance, I understand that section as not depriving the First Municipality of the property in the proceeds of the lots in question, but merely as disposing of the interest to be yielded by the said proceeds until the debts of the old corporation of New Orleans are settled and paid.

"It is always a delicate task for any court, and especially for a court of original jurisdiction, to decide upon the constitutionality of a law. No judge, I consider, ought to lose sight of those wise principles laid down by the Supreme Court of the United States, a tribunal which from its institution we ought especially to look to, in questions of constitutional law, that the presumption must always be in favor of the validity of the laws, if the contrary is not clearly established; and that in order to declare a law unconstitutional, the opposition between the constitution and the law must be clear and plain, or to use the emphatic words of the great judge who so long presided over that court (Judge Marshall), 'the opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other.'

"Upon these wise principles, I would not feel myself authorized to declare the legal provision above quoted unconstitutional.

"The Legislature, when dividing the old corporation of New Orleans into three municipalities, were in duty bound to secure to the creditors of the former the payment of their debts, for which the three municipalities were bound, and probably bound *in solido*. By the act of division, (act of March 8th, 1836,) the Sinking Fund was created, for the purpose of settling the concerns of the old corporation. That Sinking Fund was to consist of a certain amount to be paid yearly, and in a fixed proportion by each of the municipalities, of the bank and other stocks belonging to the corporation at the date of the law, of all moneys, notes, credits, and accounts in the possession of the corporation at the same date, and of the portion of paving due by individuals to the corporation. To these means, as we have seen before, the act of March 11th, 1836, added the interest of the proceeds of the lots decreed to belong to the corporation.

"At the time that the act just mentioned was passed it was by many considered as favorable to the First Municipality, inasmuch as it put at rest any supposed claim that the state might have to the lots, or the proceeds in question. Whether the act was passed with this intention or not, it is immaterial to enquire in this case; but we may, on reflecting upon the state of things at the time of the division of the city into three municipalities, conceive the motives which actuated the Legislature in applying the interest in question to the payment of the debts of the former corporation. Had the suit between the United States and the corporation, as might have been the case, been decided before the passage of the acts of March 8th and 11th, 1836, the proceeds of the lots would have been paid into the treasury of the corporation, and probably have been applied to the payment of its debts; in which case it will not be said, that the First Municipality would have had a claim for the amount after the division. Besides, the Legislature may well have considered that as the First Municipality was, by the act of division, recognized as the sole owners of the town-house, the city jail, the market, and other places established and paid for by the former corporation with the common funds, whilst the other municipalities did not receive equivalents, it was a good reason to require

from the First Municipality an additional contribution towards the fund destined to pay the debts of the old corporation, and have designated the interests above mentioned as such additional contribution.

"Such a provision, I am not prepared to consider as unconstitutional, or exceeding the powers of the Legislature.

"Entertaining the opinion just expressed, I cannot say that the plaintiffs must succeed in their demand against the Sinking Fund, which includes the capital and interests of the proceeds of the lots in question. They cannot now recover the capital, because the debts of the corporation are not shown to have been paid. They cannot recover the interest, because that interest is to go to the payment of those debts.

"But whilst denying the right on the part of the First Municipality to recover *in this action*, and at the present time, the capital of these proceeds, having acknowledged their right to claim them hereafter, and thinking that as owners of that capital, they have an interest and a right to protect and preserve it, this court is bound to reserve to them that right.

"It is therefore ordered that the plaintiffs' demand against the several defendants be dismissed with costs, reserving, however, to the said plaintiffs, all their rights to recover, in due time, the capital of the proceeds of the lots, awarded to the city of New Orleans, in the suit of the United States against the said city, and in the meantime to recur to all legal means and measures to preserve said capital, and prevent its being alienated, or spent by the Sinking Fund."

The plaintiffs appealed.

Mazureau, for the appellants.

Canon, for the Commissioners of the Sinking Fund, and the Third Municipality.

Rawle, *Grymes*, and *C. M. Conrad*, for the Second Municipality.

Garland, J. The plaintiffs allege that at the foundation of the city of New Orleans, by the King of France, certain spaces of ground were left vacant in front of said city, from its upper to its lower limits, for the use of the inhabitants, under the name of *quays*, which as such, had always been used and possessed as a common property

previous to the cession of Louisiana to the United States, and since. That in the year 1825, the inhabitants, under the administration of a corporation known by the name of the Mayor, Aldermen, and Inhabitants of the city of New Orleans, were in possession of the said *quays*, when a resolution was passed for the purpose of selling in lots, parts of said *quays*, which were included between Ursuline, Levée, and Barrack streets, and the public road, and also between Custom House, Levée, and Bienville streets, and the public road. That the United States instituted proceedings against the said corporation to prevent said sale, claiming the said spaces of ground as a portion of the public domain, acquired by the treaty of cession; which claim, the corporation resisted, and asserted the claims of the aforesaid inhabitants to said pieces of land, as a common property. That during the pendency of said suit, the parties entered into an agreement to sell the property at public auction, the proceeds to remain deposited in court, subject to the final decision of the case; in conformity with which agreement, the said pieces of ground were sold in lots, and the net proceeds amounted to $954,797 76, and afterwards, the said suit, as it is alleged, was decided in favor of the *present petitioners*, and the property declared to belong to them.

The petition further represents, that subsequent to said judgment and final decree, the proceeds of the sale being still deposited in the District Court of the United States, an act was passed by the Legislature of this state, on the 8th of March, 1836, by which the city of New Orleans was divided into three separate Municipalities, the first of which, now plaintiffs, is composed of the city of New Orleans proper, within the limits, above and below, that it had at the time it was first established, with the exception of certain parts of its commons on the upper side. That by the 15th section of said act, a Sinking Fund was created, for the purpose of paying the debts of the former corporation, which was placed under the control of certain Commissioners, and that by a subsequent act approved March 11th, 1836, supplementary to the foregoing, the moneys arising from the sale aforesaid were made to form a part of said fund, and the interest thereof directed to be applied in the same manner as other money and property composing said fund, to the payment of the debts of the former corporation.

It is alleged, that by virtue of the aforesaid provisions, the Commissioners of the Sinking Fund have taken possession of the proceeds of the aforesaid sale, to the amount of $954,797 76, to the great detriment and prejudice of the inhabitants of the First Municipality, to whom the said sum belongs, and from whom it is detained unjustly, and by an arbitrary use or abuse of power, there being no more right to take the proceeds than to take the land itself, if it had not been sold; and that the said Commissioners of the Sinking Fund, and the Second and Third Municipalities claim to hold said proceeds or sum of money, for the objects specified in the aforesaid acts of the Legislature, and refuse to deliver or pay over the same to the plaintiffs, who aver a constant willingness and ability to provide for their just portion of the debts of the former corporation. It is therefore prayed that the Commissioners aforesaid, and the Second and Third Municipalities be cited; that it be ordered and decreed that the proceeds of the sale of the aforesaid lots, 'be considered as belonging exclusively to the inhabitants of the city proper, to wit, the old city of New Orleans, within the limits which it had from the moment of its foundation by the French, above as well as below, to the time when the act entitled an act to incorporate the city of New Orleans was passed, and that as such, the said proceeds be accounted for, capital and interest, and the whole delivered over to your petitioners.'

The petition then proceeds to ask that the property which, previous to the cession of Louisiana, belonged 'to the then city of New Orleans, as commons, may also be decreed to be the exclusive property of the inhabitants thereof.' It then proceeds to allege, that in creating the three municipalities, a portion of the commons belonging to the old city was arbitrarily included in the Second Municipality, and prays that a piece of ground bounded by Canal, Magazine, Common and Tchapitoulas streets, and another piece, bounded by Common, New Levée, Canal and Tchapitoulas streets, may be decreed to be the property of the inhabitants of the *old city of New Orleans;* and that if the said pieces of ground have been sold, that the proceeds be paid to the First Municipality; and that it be adjudged to have the full, free, and exclusive right of enjoying and disposing of the same; and

that said Municipality be put in possession, any act of the Legislature to the contrary notwithstanding.

The Commissioners of the Sinking Fund, after pleading several dilatory exceptions which were overruled, answered by denying the capacity of the plaintiffs to sue in the manner and form set forth. They deny generally the allegations in the petition; they further say, that in consequence of payments made by them, out of the funds received, only a small balance is in their hands, and that the whole fund will be exhausted when the debts of the former corporation are paid.

The Second Municipality, in its answer, denies generally the allegations of the petition, and then proceeds to admit that the pieces of ground mentioned, formerly belonged to the city of New Orleans, and were sold, and the proceeds deposited as before stated. They further admit the division of the former incorporated limits of the city of New Orleans into three municipalities, the alterations and amendments made to the charter by the acts of the Legislature, passed in March, 1836, the creation of a Sinking Fund for extinguishing the debts of the former corporation, and that the Commissioners of said fund have received the proceeds of the lots sold, amounting to $954,797 76, for the purposes mentioned in the aforesaid acts of the Legislature, and that they hold the same to be administered under the said acts. It is further admitted by the Second Municipality, that by the aforesaid acts of the Legislature, the real estate which belonged to the former corporation was divided between the three municipalities, by assigning and giving to each, the portion situated within their respective limits, whereby the pieces of ground now claimed, situated within their limits, are their exclusive property. It is further averred, that said acts were a just and proper exercise of Legislative authority, for the purpose of providing for the payment of the debts of the old corporation, and making a distribution of the property.

The Third Municipality denies the right of the plaintiffs to sue, or recover on the allegations contained in the petition, and pleads a general denial.

On the trial, the plaintiffs offered in evidence, a copy of the original plan of the city of New Orleans, made by De Pauger, representing its squares, streets, quays, and commons, in the year

1724, which shows that the lowest squares were those between Hospital and Barrack streets, and the uppermost, those between Bienville and Custom House streets; the latter street is not represented at all, nor were any lots laid out above it, nor any back of Rampart street. The partition of the plantation of the Jesuits was also shown, to prove that the commons of the city extended to their lower boundary; also the records of the suits with the United States, showing the judgments of the Supreme and Circuit Courts of the United States, in relation to the property, its sale under different orders of court, and the payment of the proceeds, first by the clerk of the District Court of the United States, to the treasurer of the old corporation, and then by him to the comptroller of the Sinking Fund.

Upon a full examination of the case, the parish judge dismissed the action, reserving to the Municipality all their rights to recover in due time from the Sinking Fund, the proceeds of the lots awarded to the city of New Orleans by the judgment rendered in the Supreme Court of the United States, in the suit between the city and the United States; also reserving to said Municipality all legal means to preserve the amount, and to prevent its being improperly alienated or spent by the Commissioners of the Sinking Fund. From this judgment the plaintiffs have appealed.

In the argument of this case by the counsel for the plaintiffs, we had many authorities exhibited to show what were the rights and privileges of the inhabitants of towns and cities in France and Spain, and their colonies; and it was contended throughout that the quays and commons belonged to them, and consequently, that the inhabitants of the *old city of New Orleans* had an exclusive property in those in front of and around it. What may have been the rights of the inhabitants of the city of New Orleans under the French and Spanish governments, it is not now necessary to inquire. The radical error in this case consists, as is well stated by the parish judge, in the First Municipality supposing itself invested with the rights of those inhabitants, or that it has succeeded to the powers, rights, and privileges of the corporation created by the act of the 17th of February, 1805, and the various acts supplementary and amendatory thereof. This Municipality is the creature of the act of March the 8th, 1836; to it we must look for

its powers, rights, and authority; and it is a great mistake to suppose, because we may sometimes have to look into previous acts of the Legislature, to which the act of 1836 may refer, to ascertain its powers, that it is the residuary legatee and depositary of the powers and rights of the corporation that existed previous to March, 1836, and which, for some purposes, and in a somewhat different form still exists. That corporation is now in a state of liquidation, and as we have held in 13 La. 344, and 15 La. 128, is represented by the Mayor and Commissioners of the Sinking Fund, in all things appertaining to its settlement and rights; whilst the real property which belonged to it at the time of its division into Municipalities, belongs to the Municipality in which it is situated. 1 Bullard & Curry's Dig. 123. Nos. 108, 109. Ib. 125. No. 119. Each Municipality represents and acts, within and for the territorial limits fixed by the Legislature; but we no where find that the First is substituted for, or entrusted with the rights of the original city or former corporation.

The parish judge was correct in considering this as in some degree a petitory action, in which the plaintiff must recover upon the strength of his own title, and not by the weakness of his adversary's. As against the Second Municipality the action is essentially petitory; the judge therefore properly concludes, as the plaintiff does not stand in the place of the original city of New Orleans, that no action can be maintained by it against that defendant for the land claimed, or for the proceeds, it being situated in that Municipality, and in fact belonging to it under the act of the Legislature of March 8, 1836.

Another material error into which the counsel for the plaintiffs has fallen, is in supposing that the First Municipality is vested with the title which the inhabitants of the original city had to the lands in question, or to their proceeds, admitting (which we are not ready to do,) that they had a title such as is set up. Suppose that these inhabitants could themselves recover, the benefit would not accrue to the plaintiffs by virtue of their corporate powers, but be for themselves; and let us suppose further, that the Municipality could recover, the judgment would enure to the benefit of all within its limits, and they are now much more extensive in one direction, and more contracted in another, than the original limits

were, according to the allegations in the petition, so that all in whom the title was, or is, could not be benefited, and many in whom it is not, would profit by it.

Against the Third Municipality, the plaintiffs present no claim except so far as it is interested in the Sinking Fund, which brings us to a brief consideration of the demand on it.

The plaintiff's counsel complains loudly of the injustice and oppression practised by the Legislature, in directing the proceeds of the lots sold under the orders of the District Court of the United States, to be paid over to the Commissioners of the Sinking Fund, and the interest to be applied in the same manner as the other money in said fund, to the payment of the debts of the city or old corporation. Whether the different Municipalities have contributed to that fund in an equal ratio, is not in evidence; but the Legislature in creating these new municipal corporations had a right to dictate the terms on which they should exist, if they did not violate section 23 of the 6th article of the constitution. But for the acts of the 8th and 11th of March, 1836, it would be a serious question whether the old corporation had any right to the proceeds of the lots in question, or to any of the land or squares in controversy; and it may be further questioned whether the state has done more by the 1st section of the act of March 11, 1836, (1 Bullard & Curry's Dig. 129, No. 132,) than to grant the use of the moneys, arising from the sale of the lots mentioned, to the Sinking Fund, for the purpose of producing an interest to be applied to the payment of the debts of the city.

The Supreme Court of the United States, in the case in 10 Peters, 737, abstains from deciding any thing as to the rights of the state and the city to the pieces of ground in controversy. They say the United States have no claim to it; but they do not decide who has. The judgment of the District Court was only reversed, and no confirmation of the claim of the corporation is contained in the judgment; so that the rights of the state may not be precluded, unless the two acts of March, 1836, have ceded them.

As it is probable that the First Municipality has an interest in the portion of the Sinking Fund under consideration, we see no serious objection to reserving to them the rights allowed by the court below, but we concur with the learned judge that this suit

cannot now be maintained against the Commissioners to recover the sum claimed.

Judgment affirmed.

1 292
47 186

HENRY BONNABEL v. URSIN BOULIGNY, Sheriff.

Under the general issue, the defendant may show any fact tending to prove that he is not indebted to the plaintiff, as alleged in the petition.

In actions against officers for neglects, the redress in damages should always be proportioned to the injury really sustained. It would be unjust in such cases to place the plaintiff, at the expense of the defendant, in a better condition than he would have been had no such neglect occurred.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Grivot, for the appellant, submitted the case without argument. No counsel appeared for the appellee.

MORPHY, J. This action is brought against the sheriff and keeper of the public jail of New Orleans, for having set at liberty a debtor, who had been held to bail at the suit of the plaintiff, and was detained on a charge of fraud under the act of 1840, to abolish imprisonment for debt. After setting forth the indebtedness of the said debtor, one Joshua J. Hall, the petition avers that at the time the plaintiff's writ of arrest was executed, to wit, on the 9th of May, 1840, the said Hall was already in the custody of defendant under various writs of bail issued against him. That on the 14th of the same month, it appearing that no board had been paid by any of the creditors who had caused him to be arrested, the defendant wrote a letter to the petitioner, informing him that no jail fees had been paid since the 10th of May, and advising him that if they were not regularly paid, he would release the said Hall. That thereupon the plaintiff immediately sent and paid to the said Bouligny $3 50, for the jail fees of said Hall for the week commencing on Sunday, the 10th of May, 1840; and that every week thereafter he paid his jail fees punctually. That on the 26th of December, 1840, that day being a Saturday, plaintiff sent his clerk, as usual,

to pay the weekly allowance, or jail fees, for the said J. J. Hall, when he was informed that his said debtor had been set at large by the said sheriff, on the ground that no jail fees had been paid, when in fact they had been paid in advance for the previous week, which ended only on the 26th of December, at twelve o'clock at night. The petition further avers that by this act of the sheriff, the said J. J. Hall has absconded, and that the plaintiff has been deprived of all the resources, rights, and privileges which are granted to him by law on the person of his debtor, and that the defendant, by thus setting the said Hall at liberty illegally and without authority, when his jail fees were paid, has rendered himself liable to pay the amount of his claim against the said Hall, amounting to $2862 89, with interest and costs, and $115 50, the amount of jail fees paid to said Bouligny from the 10th of May to the 26th of December, 1840. The defendant pleaded the general issue.

The case was tried by a jury, who found in favor of the defendant. Judgment having been entered upon this verdict, notwithstanding a motion to set it aside as contrary to the law and evidence of the case, the plaintiff appealed.

We find in the record, which has been submitted to us without argument, a bill of exceptions to the opinion of the judge below, who admitted evidence to prove the insolvency of J. J. Hall. This evidence had been objected to on the ground that no such defence had been set up in the answer, which contained only a general denial; and that it should have been pleaded specially. The judge, in our opinion, decided correctly. Under the general issue, the defendant had the right to show any fact tending to prove that he was not indebted to the plaintiff as set forth in the petition; but it appears, moreover, from the bill of exceptions, that the evidence was admitted only after an offer had been made by defendant's counsel to continue the case, so that if plaintiff were taken by surprise he might have a chance of procuring evidence to show the solvency of Hall.

The receipts of the sheriff, produced on the trial, show that the plaintiff paid in advance, as required by law, the jail fees for the keeping of his debtor on the Saturday of every week, from the 10th of May, 1840, up to the 13th of November, from which time he began to pay the fees on the Friday of every week; and the last

receipt mentions expressly that it is given for the week ending at twelve o'clock on the night of the 25th of December, 1840. This change in the time of paying the fees, which was the act of the plaintiff, might have misled the defendant or his officers. The weekly allowance not having been paid as usual on that Friday, the debtor was set at liberty on the following day between the hours of ten and eleven o'clock. The record shows, moreover, that the said Hall was utterly insolvent, that he had failed shortly before, and that various executions issued against him in the fall of 1840, were returned, '*no property found.*'

Under these facts the jury had two questions to solve, that of the liability of the defendant, and that of the extent of the injury sustained by the plaintiff. Their finding is a general and absolute one in favor of the defendant. We cannot ascertain whether it is based on their opinion of the non-liability of the defendant, or of the absence of any injury to the plaintiff. Be this as it may, we can see no good ground to disturb their verdict. We have held that in cases of this kind, the redress in damages should always be proportioned to the injury really sustained; and that it would be unjust to put the plaintiff, at the expense of the defendant, in a better condition than he would have been, had the act complained of not been committed. 5 Martin, N. S., 122. 17 La., 569. Had J. J. Hall remained in the custody of the defendant, and been convicted of the charges of fraud preferred against him, the punishment of three years imprisonment, pronounced by the statute, might indeed have been of some advantage to the community by deterring others from similar practices, but could not in any way have assisted the plaintiff in recovering his money. He cannot then be said to have suffered any injury in a pecuniary point of view, even if, under the evidence, the defendant had clearly made himself liable by the course he pursued.

Judgment affirmed.

JOHN McDONOUGH v. JEAN PIERRE FOST.

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The maker of a note cannot complain of the want of protest, or that it was illegally protested.

Where the price of a sale is payable in several instalments, for each of which a separate note has been given, secured by mortgage, the hypothecary action will lie for the whole price, immediately after the maturity of the first note; but the terms of the sale must be, cash for the first instalment, and the balance payable as the subsequent instalments respectively become due.

An order of seizure and sale is always granted *ex parte;* no previous notice is required. The notice mentioned in art. 735 of the Code of Practice is not required to be given before the order of seizure and sale, but before the seizure is made; the object of this notice is, to give the debtor an opportunity of preventing the seizure by an application to the Judge.

Art. 3361 of the Civil Code, so far as it requires proof of the failure of payment to entitle a party to an order of seizure and sale, is repealed by art. 63 of the Code of Practice. Where the hypothecated property is in the hands of the debtor, and the creditor has, besides his hypothecary right, a title importing a confession of judgment, he may have the hypothecated property seized immediately, without any proof of failure of payment. Art. 63 of the Code of Practice dispenses with the necessity of putting the mortgagor *in mora*, before obtaining an order of seizure and sale, if such necessity ever existed.

No other testimony is required to support an order of seizure and sale, than the authentic act containing the confession of judgment.

In an act executed before a notary by a party who signs it by his mark, it is not necessary that it should appear that it was read or explained to him. It will be presumed, if he did not read it himself, that it was read to him by the notary.

APPEAL from the District Court of the First District, *Buchanan*, J.*

G. Strawbridge, for the plaintiff.

Hennen, for the appellant.

MARTIN, J. The defendant is appellant from an order of seizure and sale, and relies upon an assignment of errors apparent on the face of the record, as follows:

1. Because there was no protest of the note alleged to be due; nor could there be a legal protest or demand of that which was not yet due.

2. The second note sued on was not yet due, and the allegation

* An appeal having been refused in this case, a mandamus was issued to the judge commanding him to allow it. See 14 La., 350.

of non-payment of it when due, was premature, as well as untrue.

3. The notice required by art. 735 of the Code of Practice was not given to the debtor, before the order was obtained. The requiring of such notice is nothing but reasonable, and is in conformity with ancient practice.

4. There was no legal proof of 'failure of payment' given by the plaintiff to obtain this order of seizure and sale, as required by the Civil Code, art. 3361.

5. The defendant was never put in default, as required by the Civil Code, art. 1905; and the mortgage could not be enforced, until the 'failure of payment,' and the default of defendant.

6. The order was for the payment of a debt not yet due, and was therefore illegal; and the demand of the sheriff of the whole debt, interest, and costs, was for more than was due, and was therefore oppressive and unjust.

7. It is apparent on the face of the record that the plaintiff was not entitled to the whole amount of money, which he claimed; the court is bound to notice it. *State* v. *Bank of Louisiana*, 5 La., 327.

8. 'All the testimony adduced on the trial of the case,' comes up with the record, according to the statement and certificate of the clerk and judge; but it was not sufficient to authorize the proceedings.

9. The plaintiff did not adduce any legal evidence to the judge below to show that the defendant assented to the mortgage. For the defendant could not write, as the act shows, and only made his mark thereto, which was not sufficient; and no mention is made in the act that it was read to defendant; and no party unable to read an act is bound by it in consequence of putting a mark to it, unless it appears that the same was read or explained to him.

I. The defendant and appellant being the maker of the note, cannot complain that it was not protested at all, or that it was incorrectly protested.

II. When the price of the sale is to be paid by several instalments, for each of which, a separate note is given, the hypothecary action lies for the whole price immediately after the maturity of the first note. But the terms of the sale must be. cash for the first

instalment, and as to the subsequent ones, payment as they respectively become payable.

III. The notice mentioned in the Code of Practice, art. 735, is evidently that which the debtor is entitled to before the seizure. The order of seizure and sale is always granted *ex parte;* the law does not require any previous notice. The notice in the part of the Code of Practice cited is a posterior one, or at most a simultaneous one. '*In obtaining this order of seizure, it shall suffice to give three days notice.*' The notice is not required *before* the order of seizure is obtained, nor *before* the petition for it is presented; and the object of this notice is that the debtor may prevent the seizure by an application to the judge. For this three days is given him, besides a sufficient time, according to the distance between the place where the notice is given to him and the residence of the judge.

IV. The Civil Code, art. 3361, so far as it required proof of the failure of payment, is repealed by the Code of Practice, art. 63, which provides that 'when the hypothecated property is in the hands of the debtor, and where the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized *immediately*,' *id est*, without any delay to give notice, and without exhibiting legal proof of *failure of payment.*

V. The article of the Code of Practice just cited, dispenses with the necessity of putting the mortgagor *in mora* before an order of seizure issues, if such necessity ever existed.

VI. What we have said on the subject of the second error assigned, is a sufficient answer to the sixth.

VII. So it is to the seventh error. We have been referred to the *State* v. *Bank of Louisiana*, 5 La., 327;* but we found no such case in the volume to which we are referred.

VIII. No testimony was in our opinion necessary to support this action. The authentic act containing a confession of judgment sufficed.

IX. Nothing shows the inability of the defendant to read, an inability which does not necessarily result from the inability to

* The case referred to is in 5 Martin, N. S. 327.

write; and this last inability does not always result from ignorance, it may be caused by infirmity or accident. The presumption is that if the man did not read the act, the notary would have read it or caused it to be read to him.

Judgment affirmed.

WHITING VALENTINE *v.* EDWARD R. CHRISTIE.

The omission in the body of a bond, of the name of one who signs it as a surety, is immaterial.

Bail are not entitled to notice of a *fieri facias*, or *capias ad satisfaciendum*, issued against their principal.

Where two persons have signed a joint and several bond as sureties, either may be proceeded against without the other.

APPEAL from the Parish Court of New Orleans, *Maurian*, J. The bail bond in this case was joint and several, and was signed by the defendant, and Solomon High and James Mooney, as his securities. High's name was not mentioned in the body of the bond.

Micou, for the plaintiff. No counsel appeared for the appellant.

MARTIN, J. Solomon High is appellant from a judgment against him as bail of the defendant, who left the state before the judgment obtained against him could be notified. The court appointed High, his curator, to receive notice of the judgment. It was accordingly served on him. A *fieri facias* issued, which was returned *nulla bona*, and was followed by *capias ad satisfaciendum* which was returned '*non est inventus;*' and the usual process was commenced against the appellant. His counsel has complained of the irregularity of the proceeding, as the bail was not bound to accept the curatorship of the principal. The record shows that the curatorship was not repudiated, and that the service was made on him without his objecting thereto. It has been further objected that the appellant's name was not inserted in the body of the bail bond; that the execution was not served on him, and that he was not notified of the *capias;* and that his co-surety in the bail bond

is not a party to these proceedings. Our attention has been arrested by a bill of exceptions to the opinion of the court, overruling the bail's opposition to the case being immediately tried, and requiring it to be set down for a future day, according to the Code of Prac., art. 756, and to the rules of the Parish Court. This article provides that 'the cases, which are to be decided in a summary manner, shall not be set down on the ordinary docket of suits, but are decided on days fixed for the purpose, and in a speedy manner, conformably to such special rules as each court may establish on this subject.' It does not appear to us that the court erred. It is admitted that the case was a summary one, and as we have not been furnished with the rules of the Parish Court, regulating the trial of such cases, we are unable to say that they were violated. On the merits, the court correctly gave a judgment for the plaintiff. The appellant placed his name between that of the defendant and that of the other surety in the bail bond. The bail is not entitled to any notice of the *fieri facias* or *capias* against his principal, and either of them may be proceeded against without his co-surety.

Judgment affirmed.

James Martin v. Samuel Wright.

One who wishes to probe the conscience of his adversary, must bring himself strictly within the exception established by law to the rule which excludes a party from testifying in his own case.

A party to a suit can only be examined by interrogatories annexed to the petition or answer, unless with his consent. He may object to being verbally examined on the trial.

Where one of the parties to a suit is called upon to be sworn and examined on the trial, without any specific interrogatories having been previously propounded to him, he must be considered as called upon as any other witness, and be allowed to testify generally. Where the other party desires to confine his examination to certain facts, he must pursue the course pointed out by law for examinations on facts and articles.

Action before the Commercial Court of New Orleans, *Watts*, J.

There was a verdict and judgment against the plaintiff, and in favor of the defendant on a reconventional demand. The plaintiff appealed.

G. B. Duncan, for the plaintiff. No counsel appeared for the appellant.

MORPHY, J. A bill of exceptions which we find in the record, presents the only question to be determined in this case. On the trial below, the defendant was called upon by the plaintiff to answer verbal interrogatories touching certain advances of money, alleged to have been made to him in New Orleans by the petitioner. These interrogatories having been answered without objection, the defendant's counsel proceeded to interrogate him on all the other matters in controversy. To this the plaintiff's counsel objected, on the ground that defendant could not be made a general witness in his own case, and could only explain the facts and circumstances connected with the interrogatories propounded by the plaintiff. The judge overruled the objection, and states as the reasons for his opinion, that no formal application was made to the court to put any particular interrogatories to the defendant, but that plaintiff's counsel desired that the defendant should be sworn, and that it was only after he had been accordingly sworn and interrogated by the plaintiff, that defendant was examined as a general witness by his counsel; that in his opinion, a party may be formally interrogated on facts and articles, or sworn as a witness on the trial of a case, and that if sworn, he is thereby made a general witness. We think that the judge decided correctly, although we do not believe with him that it is optional with a party either to put formal interrogatories to the other party, or to have him sworn as a witness. To the general rule which excludes a party from testifying in his own cause, our Legislature has introduced an exception which authorizes parties to be examined on facts and articles annexed either to the petition or to the answer in the case; and a suitor who wishes to probe the conscience of his adversary must bring himself strictly within this exception. It is clear that if the defendant had objected to his being verbally examined on the trial, his objection must have been sustained by the court. Code of Prac. arts. 347, 348. 3 La. 241. 4. Ib. 511. When the defendant was called upon to be sworn and examined on

the trial, without any specific interrogatories being put to him, he must have understood that he was desired to testify as any other witness in the case, and it was perhaps under this impression that he consented to be sworn. Had the plaintiff intended to confine his examination of the defendant to certain facts of his case, he should have pursued the course pointed out to him by law; having neglected to do this, and having had the defendant sworn as an ordinary witness, we see no good reason why the latter should not testify generally, and without restriction in the case, in conformity with the oath administered to him.

On the merits, we find nothing in the record which makes it our duty to disturb the verdict of the jury.

Judgment affirmed.

Mark Walton v. George Beauregard.

Plaintiff was holder of defendant's note for the purchase of a lot, subsequently sold by the latter to a third person, who bound himself to pay the note. Plaintiff did not intervene in the act of sale from the defendant, and expressly declare by signing it that he accepted the vendee as his debtor; but he always looked to him as such, received payments from him, sued in his own name on the agreement in the contract between him and the defendant, and after obtaining judgment, granted him delay on conditions more onerous to defendant than any he had agreed to: *Held*, that defendant was discharged.

There cannot be a more formal acceptance of a delegated debtor, than by suing him on his obligation.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Garland, J. The defendant being sued on his promissory note, dated on the 2d May, 1834, payable five years after date, on which a balance of $1449 58, with interest, appears to be due, answered that he is not liable to pay it, because he says the note, with others, was given by respondent to the plaintiff, to secure the payment of a part of the price of certain lots of ground, situated in the city of Lafayette, which he had purchased of the plaintiff. That the defendant afterwards sold the same lots to Maurice Canon, who under-

took to pay the notes of defendant to plaintiff, and the one sued on among the rest. That Canon, having become unable to meet his engagements at maturity, the plaintiff, without the knowledge of the defendant, made an agreement with him to give him additional time to pay, on condition of his paying interest at ten per cent per annum on the amount; in consequence of which extension of time, the defendant alleges that he is absolved from all liability he ever was under to pay the note sued on.

The testimony shows that Walton sold the property to the defendant in May, 1834, for an amount payable in five years. In March, 1836, the defendant sold it to Canon for $33,000, who paid $14,000 in cash, and agreed to pay the plaintiff the notes he held, amounting to about $19,000. Canon made various payments on the notes. The last became due on the 5th of May, 1839; two days afterwards Walton sued him, and he confessed judgment for the balance due, with an understanding that no execution was to issue for twelve months, on the condition of his agreeing to pay interest at the rate of ten per cent per annum. On the 16th of July, 1839, Canon made a cession of his property, and on the 21st of March, 1840, the property was sold, leaving still due the balance claimed. It was proved that in 1836 or 1837, the property would have sold for more than $20,000, but there is no evidence of a decline of price from May, 1839, to March, 1840. It was further shown that the defendant left the state in 1836, and that he did not return until the latter part of 1839, or the commencement of 1840, and that he had no knowledge of any of these arrangements.

A judgment was rendered in favor of the plaintiff, from which the defendant has appealed.

We are of opinion that the district judge erred in giving this judgment. From the evidence in the case it is certain that Walton knew that by the act of sale from the defendant to Canon, a new debtor had been delegated, who had obliged himself to pay the debt now sued for. Soon after this contract was made, the defendant left the state, and was absent for three years; the plaintiff took no legal measures against him, but always looked to Canon, and treated with him as his debtor. From him he received large payments, and finally sued him, and recovered judgment in his own name on the promise and agreement to pay contained in the con-

tract between the defendant and Canon, stipulated new conditions for delay, and made the contract more onerous to Canon, than he had previously agreed that it should be. It is true, that in the act of sale from the defendant to Canon, the plaintiff did not intervene, and expressly declare, by signing the act, that he accepted Canon as his debtor; but his subsequent conduct shows that he so considered him, particularly when he instituted a suit to recover the debt of him. We know of no more formal acceptance of a delegated debtor, than commencing a suit against him to enforce the execution of the obligation he has undertaken towards the creditor. We think the case comes within the true intent of articles 2188, 2189 of the Code, and of the case in 9 La., 216.

If it were the intention of the plaintiff not to discharge the defendant from all liability, he should in treating with Canon, have so acted as not to have made him his debtor, nor to have made the contract more onerous on him.

The judgment of the District Court is therefore reversed; and it is further ordered that a judgment be entered for the defendant, with costs in both courts.

Wharton, for the plaintiff.
Durant, for the appellant.

HEMAN SWIFT and others *v.* MATTHIAS HARE and another.

Instructions to an agent to invest the proceeds of a bill in a particular way, is an express and special authority to endorse the bill in the name of the principal, such as is required by art. 2966 of the Civil Code; for the investment could not be made without such endorsement, whether money were to be procured by the sale of the bill, or the bill itself were to be given in payment for the articles in which the investment was to be made.

ACTION before the Commercial Court of New Orleans, *Watts*, J.
L. C. Duncan, for the plaintiffs.
Roselius, for the appellants.

MARTIN J. The defendants are appellants from a judgment, by which the plaintiffs have recovered the amount of a bill of exchange drawn to the order of the former, and endorsed to the latter by the clerk of the defendants; and the sole question which the case presents for our solution is, whether the clerk was sufficiently authorized by his employers to endorse the bill? One of the defendants, being about to depart from New Orleans, informed McDonnell that a remittance would be soon made by his partner, the other defendant, who was then in Georgia; that when it arrived he wished it to be invested in merchandize which he described; and requested him to call from time to time during his absence at the store of the firm, to see that all was going right, and on the arrival of the remittance, to assist the clerk in making the purchases. He also requested Bryan to afford assistance to the clerk. Soon after, the clerk, on receiving a letter from the partner in Georgia, opened it, and carried the bill of exchange which it enclosed to the store of Bryan, and he being out, left it with his (Bryan's) partner, telling him that he wished to have it discounted, to purchase from Bryan's firm the merchandize he was directed to procure. Bryan, on his return, attempted to sell the bill, and offered it to several brokers, who appeared willing to buy it, but required him to endorse it, which he declined doing; finally the plaintiffs bought the bill from a broker, the signature of the defendant's firm having been put thereon by the clerk, who soon after absconded. The Civil Code, art. 2966, requires the power to endorse a bill of exchange to be express and special.

The first judge was of opinion that the clerk was invested by one of the defendants, with the express and special power to invest the proceeds of the bill of exchange, which the other defendant was to remit from Georgia, in the purchase of merchandize; and that this invested him expressly and especially with the power of endorsing the bill; for the investment could by no possibility have been made without such an endorsement, whether money were procured to make the purchase by the sale of the bill, or whether the bill were given in payment to a vendor of the merchandize directed to be procured. It does not appear to us that he erred. He who authorizes another to do an act, authorizes him to do whatever is

necessary to arrive at the proposed end. *Cum quid conceditur, conceditur et id per quod pervenitur ad illud.*

Judgment affirmed.

FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS *v.* LEWIS HARPER GILLINGHAM and others.

Where property offered for sale under execution is mortgaged to secure the payment of notes, not yet due, with the accruing interest, the purchaser must retain in his hands enough to pay such notes, with interest to the day of sale, not to the period of the maturity of the notes.

GRIFFITH and Barnes are appellants from a judgment of the Commercial Court of New Orleans, *Watts*, J.

W. W. King, for the appellants. No counsel appeared for the appellees.

GARLAND, J. Under a judgment obtained, and execution issued thereon by the plaintiffs against the defendants, Griffith & Barnes became the purchasers, for $6000 cash, of a lot of ground and the improvements thereon, situated in the *faubourg* Delord. When the sheriff offered the property for sale, he read a certificate from the Register of Mortgages, stating that there was a mortgage on said property in favor of Louise Delord Burthe, wife of Dominique François Burthe, for $3600 and interest, prior to that of the plaintiffs; the certificate then says, 'which last mortgage and reversion are diminished each to the amount of seven hundred and twenty dollars.' It also appears there are several notes outstanding, which are secured by the same mortgage under which the plaintiffs claim, and consequently entitled to a concurrent privilege. The debt to Burthe will not be due for several years, but bears interest at a rate not stated. This interest is consequently secured by the same lien as the principal debt. None of the mortgages come up with the record; it is therefore difficult to understand the transac ions from the record, or to revise the calculations made by the judge of the

Commercial Court; but as the parties do not complain, we take them to be correct, if the principles he decides be so.

The question for us to decide, is what amount of the purchase money Griffith & Barnes are to retain in their hands to meet the mortgage in favor of Burthe, that is, whether they shall retain the principal and the interest due at the time of the sale, or the principal and interest accruing up to the maturity of the debt. The judge below decided the purchasers should retain in their hands the amount of Burthe's debt, and the interest to the day of sale; and we think he decided correctly.

The article 679 of the Code of Practice, says the purchaser may retain in his hands 'the amount of the privileges and special mortgages to which such property is subject.' To what privileges and mortgages was the property subject at the day of the sale? To none other than the principal and the interest then due. It is well known that a mortgage may be extinguished by the creditor acquiring the property of the thing mortgaged; we will then suppose that Burthe had become the purchaser of the premises sold, would not every one pronounce a claim on her part to retain in her hands the principal of her debt and the unaccrued interest, as approaching to an absurdity? That case would be something stronger than the present, yet we see no difference in the principle. There are some cases in which other persons than the creditor can extinguish the mortgage. Suppose one of them as applicable to the mortgage of Burthe; we presume that no syndic, or other person acting on such an occasion, would give a release for more than the interest actually due. The law and equity of this case seem to us to accord with the judgment of the Commercial Court.

Judgment affirmed.

FRANK PERRET and another v. KEILL and another.

A compromise regulates only such matters as it clearly appears that the parties intended it should embrace, and the necessary consequences thereof.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Benjamin and *Lockett*, for the plaintiffs.

Eustis, for the appellants.

MORPHY, J. The petitioners represent that in the month of March, 1837, they entered into an agreement with one Edmond Courant, acting for Keill & Courant, a commercial partnership established at Liverpool, in Great Britain, and for François Courant & Co., a commercial partnership established at Havre, in France, for the shipment to Europe of a certain quantity of cotton, to be sold for the joint account, in equal shares, of the petitioners, Keill & Courant, and the said François Courant & Co.; and that by the said agreement the cotton was to be purchased with the proceeds of bills of exchange, to be drawn by petitioners on the said Keill & Courant, and François Courant & Co., and to be by them accepted and paid.

The petitioners further show, that in pursuance of said agreement cotton was purchased, and bills of exchange were drawn by them on said Keill & Courant, and François Courant & Co., for the price of said cotton, but that the said bills were not accepted by the drawees, but on the contrary were dishonored and returned to New Orleans, where petitioners, as drawers, were obliged to take them up at a heavy advance on the original amount, for exchange, costs, charges, &c.

The petitioners further show, that F. Courant & Co. subsequently assigned to the defendants their interest in the adventure, so that they and the defendants remained alone interested therein, in the proportion of one-third for petitioners, and two-thirds for the said Keill & Courant.

The petitioners further aver, that various disputes and difficulties having arisen in the settlement of said joint adventure, an agreement was finally entered into between the parties at Havre, on the 18th of October, 1837, that all the clauses and conditions in the agreement of March, 1837, had been fully complied with, and the part-

nership existing between the said Keill & Courant and them for the purchase of said cotton had been finally closed and liquidated, with the following exception, to wit.: that Keill & Courant had not paid and had refused to credit them with the two-thirds of the loss on the returned bills of exchange, which had been drawn on the partnership account, and consequently should be charged to the partnership; that the loss on the returned bills of exchange amounted to nine thousand seven hundred and forty-four dollars and 58 cents, two thirds whereof, to wit. $6496 39, are due to the petitioners, and for which they pray judgment against the said Keill & Courant. The attorney appointed to represent the defendants, denied all the allegations of the petition, except that of their interest in the cotton shipments, and the agreement entered into at Havre, which he avers has been fulfilled by Keill & Courant. The settlement of the amount due to the plaintiffs, having been left open for further proof, by agreement of counsel, the court below decided, that in the settlement to be made between the parties, the plaintiffs should be credited with two-thirds of such sum as shall be found to be the amount of the loss on the bills returned; and from this judgment the defendants have appealed.

The only difficulty in this case turns on the proper construction to be given to the compromise entered into between the parties on the 18th of October, 1837. It is urged by the appellants' counsel, that all the matters concerning the cotton adventure on joint account were embraced by and finally settled in this compromise; and that Keill & Courant are thereby exonerated from any claim whatsoever on the part of the plaintiffs. The latter, on the other hand, contend that the main object of the agreement was to relieve Keill & Courant from the damages, for which they would otherwise have been liable as drawees, for having suffered bills drawn on them by express agreement to return protested; but that it was never intended to discharge them as partners in the adventure from the obligation of bearing their proportion of the loss on these returned bills, which had been drawn by plaintiffs for account of the partnership. As sustaining their view or construction of the compromise, the appellants rely chiefly on the second and fifth articles of that instrument. The former acknowledges the right of Keill & Courant to let the drafts return under protest, and regulates at what rates of exchange

certain sums due by the defendants to the plaintiffs in pounds sterling, and by the plaintiffs to François Courant & Co. in dollars, shall be admitted in compensation on the settlement of their accounts. The other article provides for the removal of all attachments laid by the plaintiffs on funds belonging to Keill & Courant, in New Orleans, and stipulates that the plaintiffs shall levy no other attachments on account of the business done between them, which is to be considered as finally settled by the agreement. These articles, notwithstanding the language used in the latter of them, do not appear to us inconsistent with the construction contended for by the appellees. It is clear that, but for this compromise, the plaintiffs might well have refused to bear their proportion of the loss resulting from defendants' breach of their contract, in refusing to accept the bills, and might have insisted that the whole amount of it should be borne by them. Their refusal to accept the bills, and the repudiation of the original agreement which such refusal seemed to imply, had led the plaintiffs to bring the suit reported in 15 La. 210, and to attach divers funds belonging to the defendants. The compromise took place pending these attachments, and probably with a view to remove them. From the whole context of the instrument we are satisfied, that the individual liability of the defendants to the plaintiffs for their refusal to accept the bills drawn for the cotton, was the main difficulty intended to be obviated. The unprecedented embarrassments and derangement of trade in the spring of 1837, no doubt induced the plaintiffs not to insist rigorously upon their rights, and justified in their opinion, to a certain extent, the course pursued by Keill & Courant. But the acknowledgment, which the plaintiffs made of the right of the latter to suffer the bills to return protested, was never intended or understood as affecting or questioning in any way their own right to make the shipments on joint account, and to draw against them on the two firms in Liverpool and Havre. It would be then most unreasonable to infer from it, that they intended not only to exonerate Keill & Courant from all direct and individual responsibility to them, but also to free them from all contribution to the partnership loss incident to the return of the bills, and to assume the whole amount of this loss upon their own shoulders. As the compromise exhibits no consideration whatever for such an onerous undertaking on the part of Perret & Gally, it would in fact amount

to a donation, and *nemo facile donare videtur*. It is a well settled rule, that compromises regulate only such matters as appear clearly to be embraced in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is therein expressed. Civ. Code, art. 3040. Far from there being any express mention that this compromise was a settlement of all the previous concerns between the parties, it results clearly from several articles of the instrument, that it was merely to put an end to some of the difficulties, which had arisen between them. After settling these difficulties, the agreement regulates the manner in which the accounts in relation to the shipments of cotton, the result of which was not yet known to the parties, were to be adjusted. Article 8, provides, that the 'plaintiffs are to be debited with their share in the extra charges and bank commissions paid to prevent the sacrifice of the cotton.' Article 7, 'that the defendants shall credit the plaintiffs with their (the defendants') share in the loss on the shipments on joint account;' and article 3, 'that the plaintiffs shall be allowed to verify the account of sales and other items in their details, but that the account shall in all cases be finally established agreeably to a model annexed to the agreement; and the model referred to contains to the credit of the plaintiffs, the defendants' share in the loss on the shipments. It only then remains to be enquired whether the loss on the returned bills of exchange is a part of the losses on the shipments, for which the defendants are liable in proportion to their interest in the joint operation. Of this, it appears to us, that there can hardly be a doubt. The bills of exchange having been drawn by the plaintiffs for the purchase of the cotton shipped on joint account, the loss consequent on the return of these bills must form an item, which for the purpose of ascertaining the result of the adventure, must be either deducted from the profits or added to the loss, as the case may be. The damages paid on these bills must be viewed as one of the charges of the shipments on joint account, as well as all the other expenses, such as freight, insurance, exchanges, interest, storage, &c. The exemption from the obligation to bear their share or proportion of these damages, which the defendants claim under the compromise, is not only unwarranted by the letter and spirit of that instrument, but would violate those principles of fairness and equa-

lity which should always obtain among partners, and would moreover be contrary to law. Civ. Code, art. 2785. In the language of the judge *a quo*, 'the strange anomaly might be exhibited of some of the partners making a profit by the same operation in which their co-partners incurred a loss.'

Judgment affirmed.

BRISON STILLWELL *v.* WILLIAM BOBB.

Where a note is payable at a particular place, payment must be demanded there, before a recovery can be had.

APPEAL from the District Court of the First District, *Buchanan*, J.

GARLAND, J. The plaintiff, alleging himself to be the endorsee of a promissory note, sued one of the drawers, and obtained a judgment, from which the latter has appealed.

The evidence shows that the note was executed in the state of Mississippi, where all the parties are bound jointly and severally, although the obligation be only joint on its face according to our law. The rate of interest is shown to be eight per cent; and it is further shown that the note was made payable at the Commercial and Rail Road Bank at Vicksburg.

The defendant presents various defences, but it is only necessary to notice one. He says that the note is made payable at a particular place, and that there is no evidence it ever was presented at that place for payment, previous to the institution of the suit. We have examined the record in vain for evidence to prove a demand of payment at the bank in Vicksbnrg. The plaintiff's counsel insists that by the laws of Mississippi this demand is not necessary there, and that it should not be exacted here. We are not satisfied, from any thing we see in the record, that it is not necessary in Mississippi to enable a party to recover; and if it were shown to be a rule of evidence in that state, it would still be questionable whether it

would authorize us to disregard the settled jurisprudence of our own state, which is, that whenever a note is made payable at a particular place, payment must be demanded there before a recovery can be had on it. 3 Martin, N. S., 423. 14 La., 180.

The judgment of the District Court is therefore reversed, and ours is for the defendant as in case of non-suit, with costs in both courts.

C. M. Jones, for the plaintiff.

Chinn, for the defendant.

WILLIAM BUCKLEY *v.* JOHN MCCLOSKY and others.

A steamer having been seized and advertised for sale by the Marshal of the City Court of New Orleans, under several executions issued on judgments obtained in that court and in the courts of the associate judges, a creditor who had obtained a judgment against the boat in the District Court of the United States, paid to the Marshal the full amount of all the executions in his hands, with the costs, in order to release it from seizure, and place it in the possession of the Marshal of the United States under his judgment, notifying the Marshal of the City Court at the time, that his claim on the boat was a privilege of a higher order than those of the judgment creditors at whose suit it was seized. On a rule by one of the latter to show cause why his claim should not be paid by privilege out of the funds in the hands of the City Marshal, the creditor who had obtained a judgment in the United States Court having intervened, and claimed to be paid by preference over all the other creditors, *held:* that the boat not having been sold, and the payment to the City Marshal having been made avowedly to release it from seizure, and to enable the Marshal of the United States to take possession and sell, thus depriving the original seizing creditors of their recourse against the boat, the payment to the City Marshal must be regarded as a satisfaction of the executions in his hands, and the amount be distributed among the several seizing creditors in proportion to their respective judgments.

APPEAL from the City Court of New Orleans, *Duncan*, J.

Pepin, for the appellees.

Grymes, for the appellant.

MORPHY, J. Gregory Byrne, an intervenor in this suit, appeals from a judgment dismissing his intervention under the following

circumstances. The steamboat Pioneer having been seized and advertised for sale by the City Marshal, by virtue of several executions under judgments from the City Court and the Associate Judges, Gregory Byrne, who had obtained a judgment against the boat for $6556 56, in the United States District Court, paid to the Marshal of the City Court the full amount of all the executions in his hands, together with the costs incurred on each, with a view, as he stated, to release the boat from the seizure, and place her in the possession of the United States Marshal, under his admiralty decree or judgment; but at the same time notifying the City Marshal that his claim on the boat was of a higher privilege than that of any of the plaintiffs in the various executions or writs issued against her. These facts appear from the return made by the Marshal, on a rule taken on him and the seizing creditors by one W. H. Hutchings, a judgment creditor, to show cause why his claim should not be paid by privilege and preference out of the funds in the hands of the Marshal, being the proceeds of the sale of the steamer Pioneer. After doing this, Gregory Byrne intervened, claiming a preference over all the other creditors in the distribution of the money he had thus paid to the Marshal. We concur in the view taken of this case by the inferior court. It is clear, from the return of the Marshal, that this case presents no question of distribution or privilege under article 3204 of the Civil Code. There has been no sale of the boat, and therefore no proceeds to be divided among the creditors according to the rules therein laid down; but sufficient funds have been placed in the hands of that officer to satisfy all the judgments which he held against her. All that he had to do, was to pay over to the several seizing creditors the amount of their judgments. Had these funds been made by the sale of the property under seizure, Byrne, or any other third person, might have come in by way of opposition, pursuant to article 401 of the Code of Practice; but here the payment to the Marshal by Byrne was made avowedly to release the boat from the several seizures she was under, in order to enable the United States Marshal to take possession of and sell her under his decree in admiralty. What has since been done with the boat, the record does not inform us. After paying the amount of the several executions in the hands of the Marshal and thus releasing the boat, and depriving the creditors at

whose suit she had been seized, of their recourse against her, G. Byrne cannot be permitted to contest their right to receive their respective claims. It is not pretended that this payment was made by him through error, force, or fraud. Whatever may have been his ultimate views or intentions in making it, we cannot view it in any other light than as a satisfaction of the various executions held by the Marshal, who should have made his return accordingly. Byrne may have claims against the steamboat Pioneer or her proceeds; but neither boat nor proceeds were before the City Court, which decided correctly that the money in the Marshal's hands can in no wise be regarded as the proceeds of the boat; and that the judgment creditors should receive the full amount of their claims.

But leaving out of view the ground assumed by the judge for his decision, this intervention should perhaps have been dismissed for want of jurisdiction in the City Court, the amount claimed being over $300. 1 Bullard and Curry's Digest, 214. It has since been provided by law that whenever in a conflict of privileges between different creditors, the first seizure of a piece of property has been made by an order or writ from the City Court, and the privileged or mortgaged claims sought to be enforced on said property are for an amount exceeding the jurisdiction of said court, the proceedings shall be transferred to the District Court for the first district, or to the Parish Court for the parish and city of New Orleans. 1 Bullard and Curry's Digest, 786. But at the time the intervention was filed, no such provision existed, and it was no doubt the knowledge of this want of jurisdiction, which first induced the intervenor to pay off the claims against the boat in the City Court in order to place her under the control of the United States Marshal.

Judgment affirmed.

BENJAMIN POYDRAS DE LALANDE and others v. MADELEINE MICHELLE GARNIER BORMEAU.

ACTION before the District Court of Pointe Coupée, *Nicholls*, J., by Benjamin P. de Lalande for himself, and as attorney in fact for the other heirs of the late Julien Poydras, against the defendant, represented by Gustave Delamare, her attorney in fact.

Janin, for the appellants.

R. N. Ogden, for the appellee.

BULLARD, J. The plaintiffs allege, that their ancestor, Julien Poydras, by his will, ordered that all his slaves should be considered as attached to one or other of his plantations, and sold therewith on the condition, that the purchaser should emancipate them at the expiration of twenty-five years after the sale; and that such of them as should be sixty years of age, should be free after reaching that age, and have a right to live on the plantation, free from labor, and should further receive a stipend of twenty-five dollars per annum. That one of the plantations was sold to Madame Bormeau and Madame Mourain, which was afterwards partitioned between them, and that six of the *statu liberi* fell to the share of Madame Bormeau, and that they were above the age of sixty on the 1st of January, 1833, and were entitled to the benefit of said stipulations in the contract of sale, in conformity with the testament. They aver, that Madame Bormeau, represented by her agent, the defendant, had refused to pay the said stipend, and that the *statu liberi*, aided by one of the plaintiffs, had failed in an action to recover the amount of the stipend thus due to them. They further allege, that the said stipend formed a part of the price of the slaves sold, and that said portion of the price is unpaid, and is due to the estate of Julien Poydras. They therefore pray judgment against Delamare, as the agent of Madame Bormeau, for the arrearages of said stipend, to wit, nine hundred dollars, and the further annual sum of twenty-five dollars for each of the *statu liberi*, from the 1st of January, 1839.

The plaintiffs are appellants from a judgment against them.

It appears to us, that the petition does not disclose a right of action in the plaintiffs. Admitting their construction of the will to be correct, and that by the conditions of the sale the purchaser bound

himself to comply with the conditions imposed by the will, it by no means follows, that the vendors, even with the right to enforce the specific performance of the contract, or to rescind the sale for a non compliance with its conditions, have a right to recover a part of the consideration in this form of action. The argument, that the annuity of twenty-five dollars per annum for such slaves as shall have attained the age of sixty, is a legacy in favor of such slaves, which has become lapsed in consequence of the incapacity of the legatees, and that therefore the plaintiffs have a right to recover it, has not much weight with us. In the case of these same slaves against Delamare, we held that 'the slaves, which the will requires to be kept on the plantation, with which they were bought, after their sixtieth year, free from labor, and with a yearly stipend of twenty-five dollars for their existence and support of their old age, are those which have been emancipated.' See 12 La., 270. The plaintiffs have no capacity to represent the *statu liberi*, and *non constat* but that their mistress will pay at a proper time, or that the *statu liberi* will coerce the payment as soon as they shall have acquired a legal capacity to act.

Judgment affirmed.

1r 316
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1r 316
106 212

BENJAMIN JEWELL and others, Heirs, &c., v. SARAH JEWELL and others.

An affidavit by a party, 'that the facts are true to the best of his knowledge and belief,' is as positive in point of law as if the words 'to the best of his knowledge and belief,' had been omitted.

An affidavit should be so positive, that the party may be convicted of perjury in case of his swearing falsely.

APPEAL from the District Court for Pointe Coupée, *Nicholls*, J.

Janin, for the appellants.

Stevens, for the defendants, contended that the injunction should be dissolved on account of the insufficiency of the affidavit, the party swearing only that the allegations in the petition were true

'to the best of his knowledge and belief.' He might have had no knowledge respecting the truth of the allegations. 5 La., 50, 81, 246. 13 Ib., 46. 14 Ib., 87, 274.

BULLARD, J. The plaintiffs in this case have appealed from a judgment of the District Court dissolving their injunction on the ground that the affidavit was insufficient. One of the plaintiffs made oath that 'the facts stated in the foregoing petition are true to the best of his knowledge and belief.' The judge was of opinion that the oath was not sufficiently positive, but was qualified by the latter expression, '*to the best of his knowledge and belief.*' We do not concur in this opinion. It appears to us that on an indictment for perjury those expressions would not avail the traverser, if it were proved that the material statements in the petition were false to his knowledge. The affidavit ought to be so positive that the party swearing may be convicted of perjury, if he swear falsely. This case differs materially from that in the 5 La., 80, upon which the appellee relies. In that case the party declared upon oath that 'the *material* facts were true and correct to the best of his knowledge,' and that was held insufficient. The court then remarked that 'whether the loose mode of swearing to the best of one's knowledge and belief be a sufficient abbreviation of the proper formula (used in courts of equity in the other states), we ought not to say till a case before us require our decision.' In the present case that question presents itself, and we are of opinion, that the affidavit is as positive in point of law as if the words 'to the best of his knowledge and belief' had been entirely omitted.

The judgment is therefore reversed with costs, and the case remanded for further proceedings according to law.

MARINE DENIS v. JOSEPH BARTHELEMY RAMOUIN.

Where there has been no express imputation, a payment must be imputed to the most onerous debt.

A debt contracted as surety for another is not necessarily less onerous than one due as principal; and where there has been no express imputation, a payment is not necessarily to be imputed to a debt due in the latter capacity, rather than to one due in the former. Whether a debt be more or less onerous, depends on the interest the debtor has in discharging it.

THE defendant is appellant from a judgment of the District Court of Iberville, *Nicholls*, J.

Edwards, for the plaintiff.

Janin, for the appellant, contended that the payment should be imputed to the personal debt of Blanchard, as more onerous than one due by him as surety. Civ. Code, 2162. 12 Duranton, art. 199, No. 7. 7 Toullier, art. 179.

BULLARD, J. The appellant, Ramouin, having in 1832 recovered a judgment against Narcisse Blanchard and Drausin Allain, which was recorded so as to operate as a judicial mortgage upon their property, took out his order of seizure and sale against a tract of land which had belonged to one of the debtors, but which is now in possession of the appellee. The third possessor made opposition and obtained an injunction against the order of seizure on the ground, that the mortgage had been extinguished and paid in the following manner, to wit: that Blanchard, one of the defendants, paid to Ramouin, in August, 1832, the sum of $1865 54, including the amount of the judgment against him and Allain, by a transfer to him of a debt due to Blanchard by Pritchard; and that Pritchard has long since paid the amount. This fact appearing to be satisfactorily proved, the court below perpetuated the injunction; and the plaintiff in the summary proceedings has appealed.

It appears that the sum which Ramouin received under this delegation, was not sufficient to pay the whole of his claims against Blanchard, including the judgment which had been recorded as a mortgage, and that the payment was made without any express imputation. The appellee contended successfully in the court below, that the payment should be imputed first to the judgment debt, as the most onerous. To this it is replied and urged in this court, that

the debt of Narcisse Blanchard, for which judgment had been rendered, was a security debt, and that the imputation should be made first to his own personal debts, as those which he had the greatest interest to pay.

It may be true that a judgment does not change the relative position of parties, and that a surety remains so even after judgment recovered against him, so far as it concerns his co-obligors; but as it relates to the creditors, we cannot recognize any distinction. Whatever may be the origin or consideration of a debt, it is still a debt, and whether the more or the less onerous will not depend on the question, whether it is a security debt, but whether the debtor has a greater interest in discharging it. This debt created a mortgage upon all the real estate of the defendant, and bore an interest of ten per cent. No other debt due at the time was shown to be equally burdensome. The court, in our opinion, did not err.

Judgment affirmed.

William Shea v. Joseph Schlatre.

1r 319
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1r 319
123 269

Where a laborer hired for a certain time, is discharged by his employer before the time for which he was engaged has expired, without any serious ground of complaint, he will be entitled, under art. 2720 of the Civil Code, to the whole amount of wages he might have claimed had the full term of his service arrived. This right accrues as soon as he is discharged; and the fact that he engaged his services immediately after to another employer, for the remainder of the term, cannot affect his right to recover the full amount from his first employer. But art. 2720 speaks only of the wages due to the laborer, and should not be extended to any thing else, as to an allowance for board, lodging, &c.

Appeal from the District Court of Iberville, *Nicholls*, J.

Labauve, for the appellant. No counsel appeared for the appellee.

Morphy, J. The petitioner represents that some time in April, 1839, an agreement was entered into between him and his servant Frances, a free person of color, under his care and protection, and the defendant, Joseph Schlatre. That by this agreement, his ser-

vices were engaged for one year to the defendant to give his attention, care, and industry in and concerning a warehouse at the Indian village on bayou Plaquemine, for the sum and price of six hundred dollars; and that the services of Frances were also engaged to the defendant for one year to manage and carry on a tavern or boarding house, at the same place, for one hundred dollars. That the petitioner and Frances were to be found with boarding, lodging, and washing, by the defendant during the year, as well as with the necessary servants. That the petitioner and Frances entered into the employment of Joseph Schlatre, under their aforesaid agreement, about the 15th of May following, and continued in his employment, performing both of them their duties most faithfully, until the 22d of July of the same year, when without any good and legal cause the said Schlatre peremptorily discharged the petitioner and Frances from his service. The petitioner avers that his board, lodging. and washing were worth one hundred and fifty dollars for the balance of the year, from the time of his discharge, and that for value received the said Frances has transferred to him her claim against defendant, amounting to two hundred and fifty dollars, thus entitling the petitioner to one thousand dollars, for which he prays judgment. The answer admits the agreement relied on by the petitioner and Frances, but sets forth a series of grievances and causes of complaint which, it is alleged, justified their dismissal. As the facts therein stated have not been supported on the trial by a tittle of evidence, it is deemed unnecessary to mention them. There was a judgment below in favor of the plaintiff for two hundred and forty-one dollars, with which being dissatisfied, he appealed.

The evidence shows that sometime after the plaintiff had removed from the defendant's house, he was engaged at the same place and in the same capacity by F. N. Bissel, at the rate of sixty dollars per month, and that he continued for more than one year in his employment. The district judge was of opinion, that by reason of this circumstance the plaintiff was not entitled to the full wages secured by article 2720 of the Civ. Code to the laborer who, being hired by the year, is sent away by his employer before the end of his term, without any serious ground of complaint. It appears to us that the judge erred. In this case, the defendant informed the

plaintiff in writing, that 'his services were no longer required, and that he was to consider himself out of his employment from the 22d of July, 1839.' This put an end to the contract between them, and plaintiff's claim, under the above mentioned article of the Code, was for the salary agreed on for the whole year. This right accrued to him as soon as he was discharged. 15 La., 360. The employment which he found elsewhere, could not affect this vested right.

As to the claim for the board, lodging and washing, which were to be furnished by the defendant during the engagement, we do not think that it should be allowed. The article 2720 speaks only of the wages agreed on, and should not be extended to any thing else.

It is therefore ordered, that the judgment of the district court be annulled, and that ours be for the plaintiff for the sum of seven hundred dollars, with costs in both courts.

Louis De La Croix v. John Nolan.

The proprietor of the estate owing a servitude, is bound to fix the place where he wishes it to be exercised, and until he does so prescription for non-user will not run.

A designation in the act of sale, by the purchaser of an estate subject to a servitude of way, of the place for the exercise of the right, is a sufficient delivery of the way to support a plea of prescription for non-user.

The provision of art. 786 of the Civil Code, that the time of prescription for non-user begins, as to interrupted servitudes, from the day when they ceased to be used, cannot be construed to prevent prescription where the servitude has never been used. If such a servitude be lost by non-user during a certain time, it will *a fortiori* be prescribed where it has never been used at all, for the extinguishment by non-user is founded on the presumed abandonment of the right by the person entitled to the servitude.

Where the prescription of non-user is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some one in his name, has used the servitude, as appertaining to his estate, within the time necessary to establish such prescription.

The plaintiff is appellant from a judgment of the District Court

of West Baton Rouge, *Deblieux*, J. There was judgment in favor of the defendant, on a plea of prescription.

Labauve, for the appellant.

Preston, for the defendant.

Morphy, J. On the 13th of October, 1820, the petitioner purchased of François Therriot, a portion of the rear part or double concession of his plantation, the said vendor engaging in the deed of sale to deliver to him a road of twelve feet wide for ingress and egress to and from the tract purchased to the river, and warranting the peaceable and perpetual opening of said road. On the 22d of August, 1822, the defendant, J. Nolan, bought of Therriot a portion of his front tract or plantation, and in the sale it was stipulated that Nolan should give the use of a road of twelve feet wide on his upper line for the use and benefit of the plaintiff, and the successive owners of the piece of land lying back of his purchase. The petition alleges that notwithstanding this stipulation, Nolan enclosed and stopped up said road, which he has since his purchase continually refused to open upon frequent amicable demands, thus causing to the plaintiff damages to the amount of one thousand dollars. The defendant pleads the general issue, and avers that if any such servitude ever existed in favor of petitioner, the same has been extinguished by non-usage during ten years.

The present suit was instituted only on the 26th of October, 1840, twenty years after the sale to plaintiff, and about eighteen years after the sale to Nolan, both of which established the right of way sought to be recovered in this suit. It has not been shown that the servitude claimed is a natural and necessary one, originating from the relative situation of the two tracts, which would exist independent of any agreement, and against which no prescription for non-usage can run, as provided by article 791 of the Civil Code. Pierre Blanchard, one of the witnesses, says that he cultivates the land of De La Croix, and experiences no inconvenience whatever in getting to the river from the rear tract; that he (the witness), and all his neighbors use a road contiguous to the one claimed, which was reserved for their common benefit on the land of Judge Chinn; that since 1827 this road has been used by the public, and that since that time plaintiff has always used it, although not included in the reservation made of this common road. It does not appear that

plaintiff ever exercised the right of way stipulated for him on the defendant's land, or that there has ever been any opposition or refusal on the part of defendant to let him use it, until within a short time previous to the institution of this suit, when he called upon the defendant for the delivery of this road, which would only be an enlargement of the contiguous one, which he had always used until then. It is contended on the part of the plaintiff and appellant that his right to this servitude cannot be lost by non-usage, under article 785 of the Code, because the road had never been delivered to him; that no prescription can run on account of the non-usage of a thing which has never been used, the road never having been located or fixed on any particular place of the front plantation. This position would perhaps be correct, were it true that no place had been designated for the exercise of the plaintiff's right. As the proprietor of the estate owing the servitude is bound to fix the place where he wishes it to be exercised, so long as he does not do so, prescription does not begin to run for non-usage. Civ. Code, art. 775. But in the case before us, the defendant, when he purchased of Therriot, did designate as the place for the exercise of the plaintiff's right of way, the upper line of his plantation. Of this, the plaintiff cannot pretend ignorance, or want of notice, as his demand is predicated on this very clause in the sale to the defendant, and as he himself alleges that since defendant's purchase he has repeatedly called upon him to deliver the road, though there is no evidence of such repeated demands. Such a designation in the public act of sale we consider as a sufficient delivery of the road, so far at least as to support the plea of prescription, to prevent which suit should have been brought by the plaintiff, had any opposition been made to his right or attempt to use his servitude. Civ. Code, art. 2455. But it is insisted that article 786 provides that the time of prescription for non-usage begins, as to interrupted servitudes, from the day they ceased to be used, and that in the present case the road never having been used, no prescription has yet begun to run. We cannot assent to this reasoning. It appears to us that if under the law such a servitude is lost, by the neglect to use it during ten years after it has once been enjoyed, it should *a fortiori* be prescribed where it has never been used at all, for this extinguishment by non-usage is founded on the presumed abandonment of his right by the

person entitled to the servitude. 3 Toullier, Nos. 689,691. Without making the distinction contended for, article 800 of the Civil Code provides, that when the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some person in his name, has made use of the servitude as appertaining to his estate, during the time necessary to prevent the establishment of such prescription.

Judgment affirmed.

VICTOR DUPERRON *v.* JACOB C. VAN WICKLE, Sheriff, and others.

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1r 324
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Art. 574 of the Code of Practice, which provides that the judge, on granting an appeal, shall state at the foot of the petition, the amount of the surety to be given by the appellant, relates only to devolutive appeals. In suspensive appeals the amount is fixed by the Code, at a sum exceeding by one half the amount of the judgment.

Judgment for three hundred and fifty dollars; the judge on granting an appeal fixed the amount of the bond at five hundred and fifty dollars; appeal bond executed for one hundred and fifty dollars only. Appeal dismissed, on the ground that the bond was insufficient for a suspensive appeal, being for less than half the judgment, or for a devolutive appeal, being for a sum less than was fixed by the judge.

THE defendants are appellants from a judgment of the District Court of Pointe Coupée, *Nicholls*, J.

Stevens, for the appellees, moved to dismiss the appeal; on the ground, among others, that the bond of the appellant was not executed conformably to the order of appeal, it being for one hundred and fifty dollars only, while the order required one for five hundred and fifty. 5 Mart., N. S., 237. 2 La., 88.

Janin, for the appellant. The effect of the error in the amount of the appeal bond, is to render the appeal devolutive, instead of suspensive.

MARTIN, J. The dismissal of this appeal is asked for on the ground, that a bond was given for a sum less than was required by

the order of the judge. The judgment is for three hundred and fifty dollars. A suspensive appeal was prayed for; the judge in granting it, required a bond to be given for the sum of five hundred and fifty dollars; and the bond given is for one hundred and fifty only. The Code of Practice, art. 574, provides, 'that the judge in granting the appeal, shall state, at the foot of the petition of appeal, the amount of the surety to be given by the appellant.' This article of the Code relates to devolutive appeals; for in suspensive ones the sum is fixed by the Code at an amount exceeding by one half that of the judgment. In the present case, the bond being for one hundred and fifty dollars only, is insufficient for a suspensive appeal, as it is less than one half of the judgment. It is also insufficient to support a devolutive appeal, as it is for a sum less than that fixed by the judge.

Appeal dismissed.

ABRAHAM F. RIGHTOR and others *v.* AUGUSTUS S. PHELPS.

A contract to sell a right to locate a certain number of acres 'on any unappropriated lands' of the United States in a particular state, is not complied with by the offer of a right to locate such number of acres 'on any public lands in that state subject to entry.' The contract contemplated the right of locating upon any part of the public domain within the state, while the offer restricted it to such portion as had been once offered at public sale.

APPEAL from the District Court of Ascension, *Nicholls*, J. Abraham F. Rightor, and Elizabeth Ann, his wife, daughter of William Conway, deceased, and the other heirs of the said Conway, are appellants from a judgment of the court below.

Isley and *Beatty*, for the appellants.

Miles Taylor, for the defendant.

BULLARD, J. The plaintiffs represent, that being entitled as heirs of William Conway to certain tracts of land called the White Cliff claims, amounting in all to 4560 *arpens*, which they held in common, and which lands were then possessed by other persons claim-

ing title under the United States, and that being determined to apply to Congress for permission to locate an equal quantity of lands on any of the unappropriated lands of the United States in the state of Louisiana, they did by a notarial act bargain and agree to sell to the defendant, Phelps, all their right and title to the said tracts of land, or to such similar quantity of land as might be afterwards, by act of Congress, substituted therefor out of any unappropriated public lands, which promise of sale was for and in consideration of four dollars per *arpent*, of which four thousand was payable in ten days, which was paid, and the balance on the passage of such act of Congress, it being understood that the purchaser should be bound to pay only at the rate of four dollars per *arpent* for such quantity as might be delivered to him with a perfect title; it being the object of said Phelps to acquire from the plaintiffs the right to locate a similar quantity of land on some of the public lands, by virtue of an act of Congress, the passage of which was anticipated, and to obtain which the said defendant was to take all the necessary steps at his own cost.

They further allege that on the 2d of July, 1836, Congress did pass an act by which they or their representatives were authorized to locate, within twelve months from the date of the act, on any of the unappropriated lands of the United States in Louisiana, one thousand and seventy acres in a body, and on any lands in the said state, *subject to entry*, the further quantity of 2789 acres, and that the proper officers were authorized to issue a patent or patents accordingly, provided that the petitioners or their representatives within one year, and previous to making the locations, should execute a release in favor of the United States of the land originally granted, and confirmed by certificates, Nos. 48, 49, 50.

Whereupon they notified the defendant to come forward and make his election, either to accept or reject the said act of promise of sale; and they allege that the defendant did by notarial act, on the 7th of May declare, as their legal representative, in virtue of the act of promise of sale, that he formally renounced, abandoned, and released in favor of the government the quantity of 1070 acres, and declared it to be his intention to renounce, release, and abandon the balance of said claims, as soon as he should have made the location with the approval of the proper officers of the government, in con-

formity to the act of Congress. The plaintiffs allege that in consequence of the premises, the defendant Phelps bound himself to pay the price of the whole tract or tracts as purchaser, and that he became unconditionally bound to them. They further aver that they offered in a formal manner to execute the conveyance contemplated by their agreement, and gave the defendant notice of the time and place where such conveyance would be made, but that he failed to attend. They therefore pray judgment for the balance of the stipulated price for the tracts of land agreed to be sold and conveyed.

The defendant, in his answer, admits the conditional agreement set forth in the petition, and avers that he has always been ready and willing to accept any act of Congress passed or to be passed, granting said land or otherwise, provided said act be in conformity with the promise of sale, and the understanding of the parties at the time of the contract. He further alleges that the plaintiffs never could make him a valid title to the lands, since one of the parties, the wife of Maurin, holds her portion as dotal property, which she cannot alienate.

Upon these pleadings the parties submitted their cause to a jury, whose verdict was for the plaintiffs for a part only of their demand, that is to say, for the price of such part of the lands as the act of Congress authorized to be located on any unappropriated lands in Louisiana, after deducting the amount already paid; and the plaintiffs, being dissatisfied with the judgment rendered on the verdict, prosecute the present appeal.

The appellee, in support of the judgment below, contends in this court, that it was proposed and intended by the parties, that an application should be made to Congress for permission to locate the quantity of land embraced in the White Cliff claims, on any public lands in Louisiana; and that the plaintiffs proposed to sell him their right and title to such claims, or to such other tracts as might be substituted for them, if the application should be successful; that the real object and intention was in entering into the contract, to acquire the permission of Congress to locate a similar quantity on any unappropriated lands. That the price was four dollars per *arpent* for so much as should be thus located. That the act of Congress, the passage of which he had procured by his exertions, permitted such location for only about one-third of the claim, and that to

that extent he was entitled to the advantage resulting from the act.

We readily admit the obvious distinction between *locating on any unappropriated lands*, and locating on public lands *subject to entry*. The distinction is made in the act of Congress in the record; and we therefore conclude that the parties, in their original contract, contemplated the passage of an act of Congress which should accord to the defendant the privilege of locating, not upon lands which had been offered for sale, but upon any part of the public domain within the limits of Louisiana. The act of Congress did not grant such a right for the whole quantity, but only for a certain portion; and with respect to the largest part of the right, it was restricted to such lands as were subject to entry, that is to say, such as had been once offered at public sale. It follows that, at least for a part, the defendant was not bound to accept the conveyance, and pay the price, the application to Congress, according to the intent of the parties, having failed.

It remains to enquire, whether the defendant has accepted the conditions of the act of Congress, notwithstanding this discrepancy, and thereby signified his intention to make the abandonment required by that act, and consequently to hold himself liable to pay the price. This depends upon the act of the 7th of May, which the plaintiffs allege was a formal acceptance, on the part of the defendant, of the act of Congress, and consequently a waiver of the condition that he should have the faculty to locate the whole quantity as contemplated by the contract. Let us therefore look into the act of the 7th of May, with a view to ascertain to what extent the defendant has waived any advantage he might have claimed under his original contract, and whether he has become liable for the price of the whole tract.

That act recites the substance of the original contract by which the delendant had agreed to purchase the three tracts of land, upon condition that permission should be obtained from Congress to locate the same upon any unappropriated public lands in the state of Louisiana, and that an act of Congress had been passed authorizing the heirs of Conway to locate, within twelve months from the passage of the act, on any unappropriated lands in the state of Louisiana, 1070 acres, and further to locate on any of the public lands *subject to entry*, the quantity of 2789 acres, under the

same limitations, provided the said heirs, or their legal representatives, should execute within a year from the date of said act of Congress, and before locating as aforesaid, a release in favor of the United States, for the lands originally included in the grants numbered 48, 49, and 50. The defendant then declares, in his capacity of legal representative of the heirs of Conway, in virtue of the act of sale, and in accordance with the act of Congress, that he formally renounces, releases, and abandons in favor of the United States the quantity of 1070 acres, it being the quantity he has already applied to the Surveyor General to locate, and a part of said original grants, which had been sold by the United States. He then continues to declare, in his aforesaid capacity, 'his intention to renounce, release, and abandon, in favor of the United States, the balance of said claims, to wit, 2789 acres, it being the part of said original grants, which has been confirmed by Commissioners of the United States as donations to settlers thereon, *as soon as he shall have made the location thereof*, with the approval of the proper officers of government; and he further declares, that it shall be distinctly understood that this act shall be considered as a formal and sufficient release, in favor of the United States, of the land originally included in the three grants, &c., and as soon as, and at the same time, that the proper officers shall recognise and approve the location he shall have made *in conformity with the said act* of Congress.'

This act appears to us a formal acceptance of the terms of the act of Congress. With respect to such portion of the land as had already been located by the defendant, it contains an unreserved surrender of the land originally granted, the defendant assuming to act as the representative of the heirs of Conway, in virtue of his contract with them; and as it regards the balance of the claim to be located on public land *subject to entry*, he announces his intention to comply with the act of Congress, and to release and abandon all title under the original grants, simultaneously with the approval of the locations which he is to make in conformity with said act of Congress. As to the first quantity of 1070 acres, it appears that the defendant was satisfied, and his release to the United States of so much of the land as was embraced in the original grants, was unconditional and unreserved. The plaintiffs could no longer pretend to

any title to that portion; the contract thus far had become absolute. Could that contract be divided? Was it the intention of the parties to sell or to purchase less than the whole quantity of land embraced in the three grants? The terms of the contract are: 'three tracts of land above described, containing in all 4560 *arpens*, or *such other similar quantity*, as may be hereafter, by permission of Congress, substituted therefor, on any of the unappropriated public lands,' &c. The price is declared to be $18,240, that is to say 'at the rate of *four dollars for each and every superficial arpent*.' Nothing shows that the plaintiffs intended in any contingency to sell less than the whole quantity of land embraced in the grants; and the defendant having signified his intention to comply with the conditions of the act of Congress, and to take a part of the land from that portion of the domain subject to entry, instead of insisting upon the privilege of locating the whole upon any unappropriated public lands within the state of Louisiana, is no longer in our opinion at liberty to retract without the consent of the plaintiffs. The contract of sale has become absolute, and the defendant owes the balance of the price stipulated in the contract.

It is therefore ordered that the judgment of the District Court be reversed, and that the verdict be set aside; and proceeding to render such judgment as should, in our opinion, have been given below, it is further decreed that the plaintiffs recover of the defendant fourteen thousand two hundred and forty dollars, with interest at five per cent from judicial demand, to wit: the 22d day of September, 1837, and the costs in both courts.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

A re-hearing will not be allowed on a point not made in the argument of the case, nor noticed in the points filed.

Janin, for the defendant prayed for a re-hearing.

BULLARD, J. The petition in this case for a re-hearing, brings

to our notice questions relating to the power of some of the plaintiffs to sell, which were not suggested in the points filed before the cause was set down for argument. We never allow re-hearings on points not made in the argument, and we are not dissatisfied with the construction we first gave to the contracts between the parties.

Re-hearing refused.

EDMOND BOURG, and others, Heirs, &c. *v.* LOUIS MONGINOT and others.

Where the sheriff neglects to publish the advertisements required by law on the sale of property under execution, the title of the debtor will not be divested.

The prescription of five years, established by the act passed the 10th of March, 1834, and promulgated the 28th of April following, in favor of purchasers at public sales, runs from the day of sale; but where the sale was made before the passage of the act, prescription must be reckoned from the day of its promulgation.

APPEAL from the District Court of Assumption, *Deblieux*, J. The plaintiffs sue as heirs of Maxil and Caroline Bourg.

Miles Taylor, for the plaintiffs. No counsel appeared for the defendants.

MARTIN, J. The defendants are appellants from a judgment, by which the plaintiffs have recovered a tract of land sold as their property, on proceedings before the parish judge, at the suit of two individuals, to whom had been adjudicated certain work required to be done on the levées, roads, bridges, and ditches of said land, and for taxes due thereon. The defendants claimed a title under the sheriff's deed, and pleaded the prescription of ten and five years. The district judge was of opinion that 'the character of those proceedings is such, that it would be futile to enter seriously into the discussion of their validity.' Be that as it may, the sheriff in the sale under which the defendants claim, appears to have so utterly neglected to make the advertisements required by law, that the plaintiffs were not divested of their title. The prescription of ten years cannot avail the defendants, as the sale was effected on the 22d July, 1829, and this suit was instituted on the 1st April,

1839, so that upwards of three months were lacking to complete the ten years. It appears from a certificate of the Secretary of State, that the act of 1834 which established the prescription of five years, in favor of purchasers at sales under execution, was promulgated on the 28th day of April, 1834. The prescription according to this act, runs from the day of the sale, but as in the present case, the sale took place before the passage of the act, the prescription is to be reckoned from the day of its promulgation; so that on the day the suit was instituted there were twenty seven days lacking to complete the prescription of five years.

Judgment affirmed.

WILLIAM NOLAN *v.* JOHN W. DANKS, and another.

Drunkenness in a laborer, hired for a certain term, is a sufficient cause of dismissal, without any stipulation to that effect in the contract.

A laborer, discharged by his employer, for good cause, before the expiration of his term of service, is entitled to recover his wages up to the time of his discharge. Art. 2719 of the Civil Code, which provides that the laborer may leave his employer, or the employer may discharge his laborer, for good cause, before the expiration of the term of service, pronounces no forfeiture against the party giving the other just cause of complaint.

APPEAL from a judgment of the District Court of Lafourche Interior, *Nicholls*, J. The facts of this case are detailed in the opinion of the court. The agreement between the parties provided that the plaintiffs should 'give the said Nolan eight hundred and fifty dollars' for one year's services, and furnish him with certain supplies in the course of the year, 'on the conditions that he said Nolan should attend strictly to their business,' &c., 'and do all other things that it is the duty of an overseer to do, and not taste any kind of spirits, or wine until' the expiration of the term of his engagement.

Isley, for the plaintiff.

Beatty, for the appellants.

MORPHY, J. The petitioner claims eight hundred and fifty dollars for his services as overseer on the plantation of the defendants, from the 1st of January, 1839, to the 1st of January, 1840, under a written agreement with them, bearing date the 10th of April, 1839. This instrument, after setting forth divers obligations entered into on both sides, concludes with the stipulation that Nolan engages to do all other things that it is the duty of an overseer to do, and not to taste any kind of spirituous liquors or wine, until the 1st day of January, 1840. The defence is, that previous to the written contract between the parties, the defendants had employed the plaintiff as an overseer, but that finding him disposed to become intoxicated, they discharged him; but that afterwards, at his own urgent request, they again employed him, giving him an increase of one hundred dollars on his wages, upon the express condition that he should abstain from drinking any spirituous liquors for the balance of the year. That in consideration of this increase of wages, the plaintiff assented to this condition, but that he afterwards became repeatedly so intoxicated as to be entirely unable to fulfil his duties, and that the defendants were obliged to discharge him at a season of the year when it is difficult to procure an overseer; and that by his misconduct he has caused damage to them to the amount of $700. The answer sets forth divers sums paid by the defendants for the account of Nolan, and concludes with a reconventional demand against the plaintiff for the sums thus due to the defendants. There was a judgment below in favor of the plaintiff for $410 41, from which the defendants appealed.

The evidence shows that Nolan remained on the plantation, discharging the duties of an overseer, from the 1st of January, 1839, to the 11th of October, when he was discharged; and that previous to this latter date he was seen on several occasions in a state of intoxication. Drunkenness we should consider a legitimate cause of dismissal, even without any stipulation to that effect in the contract between the parties; but the question is whether by thus giving to his employer such a cause of complaint as justified his discharge, the plaintiff has forfeited his wages for the length of time the defendants thought proper to keep him at work on their plantation. Articles 2720 and 2721 of the Civil Code provide that should a laborer, having without any just cause of complaint, leave his employer

before the expiration of his engagement, he shall forfeit his wages; and that, on the other hand, should the employer send him away without any just cause, before the end of the year, he shall pay the full amount of his wages, as if he had served the whole time. The previous article, 2719, which provides that for just and good causes the laborer may leave his employer, and the employer may send away the laborer, before the expiration of the time agreed upon, pronounces no forfeiture against the party who gives to the other a just cause of complaint; nor does it follow necessarily by implication from the two succeeding articles quoted above. We do not feel ourselves authorized to pronounce a forfeiture, which is to be found neither in the law, nor in the agreement of the parties; and cases may well be imagined, in which great hardship and injustice would result from the doctrine contended for by the defendants. After an exemplary course of conduct, and valuable services rendered to his employer during the greatest part of his engagement, a laborer may commit a fault justifying his dismissal, but it appears little consonant to equity that such a fault should have a retrospective effect, and deprive him of the wages he had up to that time faithfully earned, and that the employer should enrich himself at the expense and by the sweat of his brow. The agricultural interests of the country have induced the law-giver to pronounce expressly a forfeiture, in the cases provided for by articles 2720 and 2721, where there is a positive and voluntary abandonment of the contract by the laborer or the employer: but we cannot extend it to other cases, however analogous they may appear. The fault committed by the plaintiff, although doubtless very blameable, might well have been anticipated, for promises such as that obtained from him, are proverbially known to be seldom, if ever kept, and had they intended that a forfeiture of his wages should be incurred by the breaking of his promise, they should have made an express stipulation to that effect. It does not appear at what times, or how long before his dismissal, plaintiff got drunk. If he was retained any length of time after his last act of misbehaviour, he might, in like manner, have been suffered to work until a few days before the expiration of the year, and then might have been dismissed for his past transgressions, without receiving any pay. Upon the whole, we think that the judge decided correctly in allowing to plaintiff

his wages for the time he was at work on the plantation of the defendants, who appear to have been otherwise satisfied with his services.

Judgment affirmed.

THEODORE SEGOND *v.* EMANUEL LANDRY.

A renunciation of prescription may be proved on the trial, though not alleged in the petition. Such an allegation is unnecessary, for the plaintiff cannot know that prescription will be pleaded in the answer.

Waiver of prescription may be proved by one witness, where the amount of the obligation is under five hundred dollars.

The english text of article 3423 of the Civil Code, is an incorrect translation of the original french. The french text is copied *verbatim* from article 2220 of the Code Napoleon; and means only that no renunciation can be made, at the time of entering into a contract, of the right of pleading a prescription which may be thereafter acquired. It does not prohibit the renunciation of the benefit of time already elapsed, to prevent prescription from being accomplished, which is but an interruption of prescription such as would result from an acknowledgment of the debt. But no stipulation can be made to prevent its running anew, the moment after such interruption.

APPEAL from the District Court of West Baton Rouge, *Nicholls*, J.

MORPHY, J. The defendant is sued on an open account for goods sold and delivered, and on sundry notes of hand. The answer pleads the general issue, admits the signatures to the notes sued on, and opposes the plea of prescription as to a note of $417 59, bearing date the 25th of February, 1834, payable one year after date. There was a judgment below in favor of plaintiff only for $397 78, from which he prosecutes this appeal.

On the trial, a bill of exceptions was taken to the opinion of the judge, admitting testimony to prove an endorsement on the note, in pencil mark, in the handwriting and over the signature of the defendant, purporting to be a renunciation of prescription, bearing date the 19th of February, 1840, and several conversations between the witness and the defendant, in which the latter disclaimed any intention of availing himself of the plea of prescription. The testi-

mony had been objected to on the ground that such renunciation formed no part of the pleadings, and could not therefore be proved; that parol evid. nce was inadmissible; and that even, if admitted, such evidence could have no effect, as a renunciation cannot be made when prescription is not yet acquired. The judge, in our opinion, decided correctly. It was not necessary for the plaintiff to allege the defendant's renunciation of a prescription, because the plea might or might not have been made in the answer, and the plaintiff had every reason to believe, that it would not be relied on. The proof of this renunciation was rendered necessary by the defence set up, and could be made by one witness, the amount of the obligation not exceeding five hundred dollars. The judge, however, after admitting the evidence, sustained the plea of prescription, being of opinion that as there were a few days wanting to complete prescription, it could not be lawfully renounced by defendant. In this, we think, he erred. He appears to us to have misunderstood article 3423 of the Civil Code, which provides that 'one cannot renounce a prescription not yet acquired,' &c. The english is evidently a bad translation of the french text, which is taken *verbatim* from the Code Napoleon, article 2220, '*on ne peut d'avance rénoncer à la préscription.*' This provision, according to the french commentators, means simply that no anticipated renunciation can be made of the right of pleading a prescription, which may be thereafter acquired. If at the time of making a contract, parties were permitted to renounce beforehand future prescriptions, these renunciations would be always stipulated, would become a standing and customary clause in every contract, and thus the beneficial effects to society supposed to flow from prescription would be defeated. According to their understanding of this provision of the law, nothing in it would prevent a party from renouncing the benefit of the time which has been running, to stop prescription from being accomplished. Such a renunciation they view in the light of an interruption of the prescription, such as would result from an acknowledgment of the debt; but no stipulation can be made to prevent prescription from running anew the very moment after such renunciation or interruption, for, as remarks Bartolus, '*renuntiaretur juri ob utilitatem publicam introducto; quod fieri non potest.*' 1 Troplong on Prescription, No. 45. Duranton, 218. No. 117.

This construction appears sound and reasonable. The absolute renunciation of the right of pleading prescription at the time of entering into a contract, was the stipulation intended to be prohibited as contrary to the policy of the law of prescription. But where prescription has been for some time progressing, we can see no good reason why a party should not be permitted, in order to obtain some indulgence from his creditor, to waive the time which may have run, since under article 3486 he can do the same thing by expressly acknowledging the debt; in fact, such a waiver implies the acknowledgment of the debt, and must interrupt prescription.

This sum of $417 59 being added to the amount which is proved to be due to the plaintiff, entitles him to $852 74.

It is therefore ordered, that the judgment of the district court be reversed; and that the plaintiff do recover of the defendant the sum of eight hundred and fifty-two dollars and seventy-four cents, with legal interest from the day of judicial demand, and costs in both courts.

Labauve, for the appellant. No counsel appeared for the appellee.

Jean Falcon v. George Boucherville.

Where the consideration of a mortgage is not stated in the act, and the mortgagor pleads a failure of consideration, parol evidence is admissible to prove the nature of the consideration and its failure.

Plaintiff mortgaged a slave to defendant, an attorney, to secure the payment of three hundred dollars, in consideration of his paying a debt of eight or ten dollars due by the former to a third person, and conducting a suit for him for the recovery of a tract of land. Defendant paid the debt, but took no steps towards instituting the suit. On an application to enjoin an order of seizure and sale obtained by the latter, injunction perpetuated, on the ground that the payment from the smallness and uncertainty of its amount, the principal part of the consideration having failed, would not authorize the resort to an order of seizure and sale, reserving to defendant his right to recover back the amount paid by him.

Appeal from the District Court of Lafourche Interior, *Nicholls*, J.

Isley, for the plaintiff.

Boucherville, pro se, argued: 1, That an authentic act is full proof of itself, and that no parol evidence can be admitted against or beyond what it contains. Civ. Code, 2233, 2256. 4 Toullier, pp. 303, 307. 16 La. 130. 2, That where a mortgage is executed to recover the payment of a certain sum acknowledged by it to be due, no evidence can be adduced to prove a failure of consideration. 18 La. 69. 3, That where part of the consideration of a mortgage fails, the mortgage subsists for the security of the remainder.

Martin, J. The defendant is appellant from a judgment perpetuating an injunction obtained to stay proceedings on an order of seizure and sale which he had procured, the judgment having been rendered on the ground of the absence of any consideration to support the defendant's claim to the mortgage he sought to enforce. The authentic act, from which the confession of judgment is said to result, expresses only that the mortgagor has declared that he owes the mortgagee the sum of three hundred dollars, without stating the nature of the debt, or the consideration from which it arises. The plaintiff alleges, that the real consideration of the debt of $300 mentioned in the authentic act, was the payment by the mortgagee of a judgment which Foley had obtained against the mortgagor for ninety six dollars, interest, and costs, and a compensation to the mortgagee for his services in a suit, which he was to carry on for the mortgagor, in order to recover a tract of land. That the mortgagee has utterly neglected and refused to pay the said judgment, so obtained by Foley against the defendant, or to institute the suit aforesaid; whereby the consideration of the debt of $300, for which the mortgage was given, has entirely failed. Our attention is first drawn to a bill of exceptions taken by the defendant to the admission of parol evidence, to establish the nature of the consideration of the debt and its failure. It does not appear to us that the court erred. The plaintiff relied on the failure of the consideration, and as this consideration was not stated in the act, it became necessary to establish it by testimony, in order to prove its failure.

On the merits, the record shows that the plaintiff was in no way indebted to the defendant at the date of the authentic act, and that the sum of $300 therein mentioned was principally the compen-

sation the defendant was to receive for his services, in a suit to be instituted for the recovery of a tract of land claimed by the plaintiff, which suit the defendant utterly neglected to bring. It does not appear that the defendant bound himself personally to pay the judgment obtained by Foley against the present plaintiff, but that he engaged to discharge it from the proceeds of the sale of the mortgaged slave. This judgment has however been paid without the aid of the present defendant. It is in evidence that the latter has paid to one Birdsall a small sum of money, the precise amount of which is not shown, but it is sworn not to have exceeded ten dollars.

The district judge has reserved to the defendant his right to claim the last mentioned sum, which, from its smallness and indefiniteness, he has thought useless otherwise to notice, having concluded that it alone could not justify a resort to an order of seizure and sale. It does not appear to us that he erred.

Judgment affirmed.

DELPHINE SOLET *v.* JEAN BAPTISTE SOLET.

APPEAL from the District Court of Lafourche Interior, *Nicholls*, J.

MARTIN, J. The defendant is appellant from a judgment obtained against him, in an action of slander, by his daughter, who charges him with having said that '*that she was a thief*,' and '*that she was the most base and infamous person that ever lived.*' She had a verdict for five dollars, and judgment accordingly. The parties are persons of color. The plaintiff left the defendant to live in concubinage. The words charged appear to have been spoken in a moment of irritation, on the departure of the plaintiff with the man with whom she went to live. It appears to us that the relation in which the parties stand to each other, renders it probable that in rebuking his daughter for her ill-conduct, the father was

under the influence of a sense of duty, rather than prompted by malice to injure her. If, during the excitement under which he was, he used an expression which, if applied to any other person than a guilty daughter, might be imputed to a malicious intention, his relation to her, and her own misconduct repel the imputation. The trifling sum for which the jury gave their verdict, manifests their opinion that little injury was done the plaintiff; and we think the verdict ought to have been for the defendant.

It is therefore ordered that the judgment be reversed; and that ours be for the defendant with costs in both courts.

Boucherville, for the plaintiff.

Beatty, for the appellant.

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PETER BUTTERLY *v.* PIERRE VALMONT BLANCHARD.

One who has received an injury, for which he is entitled to damages in a civil action, and which may give rise to a criminal prosecution, may lawfully receive a sum as the amount of the damages to which he is entitled, even when offered in the hope that, being satisfied therewith, he will not resort to a criminal prosecution; and a promise to pay such damages is a good consideration for a note.

APPEAL from the District Court of Ascension, *Nicholls*, J.

Miles Taylor, for the plaintiff. 1. The contract was legally entered into by the plaintiff to obtain compensation for a personal injury, without in any manner obstructing the administration of public justice. Chitty on Contracts, 513, 515, 519, 524 *and note.* 2. The money already paid cannot be recovered back, though the contract be illegal. Ib., 498.

Connelly and *Isley*, for the appellant.

MARTIN, J. The defendant, sued on his promissory note, resists the claim of the plaintiff, on an averment that the plaintiff is without interest therein, as he transferred it to a third person, and erased the endorsement without the authority of the transferree. He further urges that the note was given without a lawful conside-

ration, the object of the defendant having been to prevent the plaintiff from instituting a criminal prosecution against him; and he claims in reconvention the sum of five hundred dollars, which he paid to the plaintiff for the same purpose. There was a verdict and judgment for the plaintiff, and the defendant appealed.

His counsel has contended in this court, that the consideration of the note, being the suppression of a criminal prosecution, was unlawful. Civ. Code, arts. 1885–9. 3 Martin, N. S., 46. 5 Ib., 409. 6 Ib., 220.

The record shows that the endorsee of the note deposed, that he never had any interest therein, it having been endorsed to him for collection only, and that he erased the endorsement himself.

The defendant had violently assaulted and beaten the plaintiff, and being desirous of avoiding any prosecution, and the plaintiff wishing to obtain some satisfaction, the former agreed to pay to the plaintiff one thousand dollars, one half of which was paid, and the note sued upon executed for the balance. It does not appear that the plaintiff engaged not to provoke a state prosecution against the defendant.

It is perfectly lawful, for a person who has received an injury, for which he is entitled to damages in a civil action, and which may be the basis of a state prosecution, to receive a sum tendered as the amount of the damages to which he is entitled; even when it is offered, in the hope, that the injured party, satisfied therewith, will not resort to a state prosecution. Indeed when a compensation is thus accepted, and the case is not attended with aggravating circumstances, the court generally contents itself with the infliction of a nominal fine.

Judgment affirmed.

MARIE MADELEINE BORNE v. ROSALIE PERRET, Tutrix.

APPEAL from the Court of Probates of Lafourche Interior, *Knoblock*, J.

Boucherville, for the appellant. No counsel appeared for the plaintiff.

BULLARD, J. The plaintiff sues her former tutrix, to recover the amount due her from her father's estate, and for an account of her tutorship. She recovered a part of her claim, and the defendant appealed.

The case turned in the court below upon questions of fact merely, and a careful examination of the testimony has failed to satisfy us, that the court erred. It was not shown satisfactorily, that the father of the plaintiff administered the paraphernal estate of his wife, or that any offsett was due on account of sums received by him for the defendant. If the tutrix had rendered her account as contemplated by law, she would have been entitled to the costs attending such rendition under article 352 of the Civil Code, as contended for by the appellant; but not only she rendered no such account, even when sued in this case, but it became necessary to coerce her by suit to pay over what was in her hands, and in our opinion the costs of suit were properly taxed against her.

Judgment affirmed.

Joseph Kenton v. Michaela Leonarda, Baroness of Pontalba.

The transfer by the King of Spain of the sovereignty of Louisiana to the French Republic, was not complete by the treaty of San Ildefonso, of the 1st of October, 1800, nor by that of Madrid, of the 21st of March, 1801. Spain continued to be the sovereign *de facto;* and the terms of these treaties do not necessarily import a change of sovereignty *de jure*, but only convey the idea of a promise to cede on the performance of certain conditions precedent. The first authentic evidence of any admission by the King of Spain that the conditions had been performed by the French Republic, or of any act towards the execution of the promise stipulated in those treaties, is in the *Cédula* or Royal Order of the 15th of October, 1802, the terms of which are inconsistent with the idea that the sovereignty of Louisiana had already vested in the French Republic.

The Royal Order of the King of Spain for the retrocession of the territory of Louisiana to the French Republic, was dated the 15th of October, 1802; the appointment of Commissioners to deliver possession. was made on the 13th of May, 1803; and the final surrender of the colony, was made on the 30th of November following.

On the transfer of the sovereignty of a country, the inhabitants are protected in the possession of their private property. Such is the law of nations, even in cases of conquest.

This action was instituted before the District Court of the First District, *Buchanan*, J. The plaintiff claims to be the owner of a tract of land, between the inhabited part of the city of New Orleans and the bayou St. John, having two *arpens* front on the south west side of the canal Carondelet, near the first half-moon, and extending between parallel lines to Common street, on which it also fronts, one of the side lines being seventeen *arpens*, two *toises*, and two feet in length, and the other seventeen *arpens*, and five *toises*.

Preston, for the plaintiff.

Janin, for the defendant. The grant under which the plaintiff claims is void, for it was made on the 20th of May, 1801, and by the fourteenth section of the act of Congress of the 26th of March, 1804, (1 Land laws, 503,) it is enacted 'that all grants for lands within the territories ceded by the French Republic to the United States, by the treaty of the 30th of April, 1803, the title whereof was, at the date of the treaty of San Ildefonso (1st October, 1800), in the crown, government, or nation of Spain, and every act and

proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim, to such lands, and under whatsoever authority transacted or pretended, be and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity.'

An exception is made by a proviso in favor of persons who have '*actually settled*' on the lands so granted to them, before the 20th of December, 1803.

This law, which has never been repealed, must decide the question. The plaintiff's claim has never been confirmed by the United States, and he is not within the above exception. For the tract granted is a low swamp, it never was, and indeed, in its present condition, is not susceptible of settlement.

'Settlement,' in the meaning of the acts of Congress, requires cultivation and permanent occupancy. *Hickie* v. *Starke*, 1 Peters, 94. 2 Land laws, 465.

Congress, in its subsequent acts, persevered in the same policy. By the first section of the act of March 2d, 1805, providing for the settlement of spanish and french land titles in Louisiana, grants made subsequently to the 1st of October, 1800, are again excepted from the measures prescribed for other claims, 1 Land laws, 518, and the proviso of the fifth section of the same act says, (p. 521,) 'that nothing in this act shall be construed so as to recognize any grant or incomplete title, bearing date subsequently to the 1st of October, 1800, or to authorize the commissioners aforesaid to make any decision thereon.'

By the fifth section of the act of the 21st of April, 1806, 1 Land laws, 534, the land commissioners were directed 'to enquire into the nature and extent of the claims which may arise from a right or supposed right, to a double or additional concession on the back of the grants or concessions heretofore made, or from grants and concessions heretofore made to minors, and not embraced by the provisions of this act, or *from grants or concessions made by the spanish government subsequent to the 1st of April, 1800, for lands which were actually settled and inhabited on the 20th of December, 1803, and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress at their next ensuing session.*'

Mr. Gallatin's instructions, which were approved by the President, 1 Land laws, 986, direct that all grants posterior to the 1st of October, 1800, must be rejected, unless they are embraced by the second section of the act of March 2d, 1805, (Ib., 518,) that is, unless they were both '*cultivated* and *inhabited*' before the 20th of December, 1803.

The preceding are the only provisions of the laws of Congress relating to those claims. They deprive the plaintiff of all right; conscious that he was not within the exception, he did not even make an effort to have his claims confirmed. What can the plaintiff oppose to these positive enactments? He is without an answer, unless they be unconstitutional or contrary to the treaty of cession. But such an assertion is easily met.

Congress has always treated grants posterior to the 1st of October, 1800, as nullities, because from that date, which is that of the treaty of San Ildefonso, Louisiana ceased to belong to Spain, or at least, Spain was deprived of the right of disposing of any part of the domain. The treaty of San Ildefonso is not to be found in the books which are usually consulted, but the only part material in this controversy is recited in the treaty of cession of Louisiana to the United States, art. 1. 1 Land laws, 42. 'Whereas by the third article of the treaty of San Ildefonso, the 9th Vendémiaire, an 9, (1st. October, 1800,) between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows: His Catholic Majesty promises and engages on his part to retrocede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein to his Royal Highness the Duke of Parma, the colony or province of Louisiana, with the same extent,' &c.

It is useless to enquire what those conditions were, and when they were complied with. It is well known that from the date of the treaty, both parties considered Louisiana as belonging to France; that Spain was satisfied with the manner in which France acquitted herself towards the Duke of Parma, and never threw any obstacles in the way of the delivery of Louisiana, which was delayed only on account of causes foreign to the treaty. If Louisiana had not been ceded *instanter* by the treaty, the treaty would at least be correctly assimilated to a promise of sale coupled with a suspensive

condition, the accomplishment of which lies with the vendee. On the accomplishment of the condition he would become the absolute proprietor, and be entitled to the possession of the property, without diminution, and any partial sales subsequent to the promise of sale in question would be null as to him. As France stipulated to give a fixed and well ascertained equivalent for Louisiana as it was on the 1st of October, 1800, she was entitled, on complying with her engagement, to the undiminished ownership of what she had agreed to buy on that day. If Spain did not prevent subsequent concessions by her officers, the fault was hers, and France cannot suffer therefor. In a question between two governments affecting the interests of their subjects, the subjects of neither can be considered as third persons.

The United States acted with becoming liberality by confirming these subsequent claims, which were immediately converted by the grantees to their legitimate purpose by actual settlement. No motive of policy, no principle of justice required the confirmation of grants not settled on.

This question is not a new one. It underwent a full and elaborate discussion in the case of *Foster and Elam* v. *Nielson*, 2 Peters, 288, and that decision was followed in the cases of *Garcia* v. *Hatch*, 8 Martin, N. S., 398, and *Garcia* v. *Lee*, 12 Peters, 511. In these three cases lands were claimed lying between the thirty first degree of latitude, the Iberville river, the Mississippi, and the Perdido. After the cession of Louisiana, Spain still retained the possession of this portion of country until 1810, claiming it as a part of West Florida. The United States, on the contrary, claimed it as a part of Louisiana. The questions decided by the courts were: 1. That the district of country in question was a part of Louisiana, and passed as such to the United States by the treaty of cession of 1803. 2. That the grants sued on were null and void, because they were posterior to the treaty of San Ildefonso of the 30th of October, 1800. It is unnecessary to do more than to refer to the reasoning of Chief Justice Marshall in the case of *Foster and Elam* v. *Nielson*. 2 Peters, 288. The latter point, in the opinion of the Supreme Court, was alone sufficient to decide the case against the plaintiff, and has alone a bearing upon the present case. It may be observed that the grants in those cases were posterior to the 20th of

December, 1803, but in the case of *Foster and Elam* v. *Nielson*, the order of survey was anterior to that date, and consequently that case is in every respect analogous to the present.

But Congress never made any difference between *unsettled* grants posterior to the 1st of October, 1800, whatever might be their precise date. The same laws and the same reasoning are applicable to all these cases. It that decision, it will also be noticed that the court is of opinion 'that the judiciary is not the department of the government, to which the assertion of its interests against foreign powers is confided; and that its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.' 2 Peters, 307. The applicability of these views to the present case is obvious. The United States have uniformly maintained that Spain had no right to grant lands in Louisiana after the treaty of San Ildefonso; and our courts would not, without strong reasons, declare the contrary. See particularly pp. 315 and 316, which contain a recapitulation of the acts of Congress. On p. 304, Chief Justice Marshall says, 'the act of March 26th, 1804, sec. 14, (which annuls all grants posterior to 30th October, 1800,) *was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and withovt deciding on the extent of that retrocession, to put the titles which might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government.*'

It follows, that without a positive confirmation by Congress, such claims have no value whatever.

The cases of *Harcourt* v. *Guillard*, 12 Wheaton, 528, *Henderson* v. *Poindexter's Lessee*, Ib., 500, and *Poole* v. *Fleeger*, 11 Peters, 207, present instances of grants made by the wrongful, though *bona fide* possessors of the country, and annulled for reasons similar to those presented by this case.

Bullard, J. The defendant, by her agent, having advertised for sale at auction certain lots of ground in the rear of the city of New Orleans, the plaintiff obtained from the District Court of the first judicial district an injunction restraining her proceedings, on alleging title to said lots, and denying the right of the defendant to

the same, and praying to be quieted in his title against her pretensions. The defendant, by her answer, denies the right of the plaintiff, asserts title in herself to the *locus in quo* in dispute, and further pleads prescription of ten, twenty, and thirty years. Judgment having been rendered in favor of the plaintiff in the court below, the defendant prosecutes the present appeal.

The plaintiff exhibits as evidence of title, a patent in due form, granted by the Intendant of Louisiana, Don Ramon de Lopez y Angulo, and bearing date the 20th of May, 1801, (and which appears to have been duly registered in the land office of the United States,) in favor of Carlos Guardiola, together with a regular chain of conveyances from the original grantee down to himself.

The argument in this court has turned mainly upon the alleged nullity of this grant. It has been strenuously urged that it is void, because after the 1st of October, 1800, the date of the treaty of San Ildefonso, Spain was no longer the sovereign of Louisiana; that it belonged *de jure* to the French Republic, and that the Governor, Intendants, or Sub-delegates, acting under the pretended authority of Spain, had no longer a right to make any grants of land. It is further contended that even supposing the authority of the Intendant unimpaired, the grant is nevertheless void, because the same land had been previously conceded by the government of France as early as 1752 and 1764; and that the certificate of Trudeau, the Surveyor General, that the land was vacant previously to Guardiola's grant, was manifestly erroneous.

It is therefore under this two-fold aspect, that we are to examine the pretensions of the parties. If Guardiola's concession be void, either on the ground of a change of sovereignty previous to its date, or because the land no longer belonged to the domain, then the plaintiff must fail.

I. It is probable that some misconceptions have existed in relation to the celebrated treaty of San Ildefonso. It would seem from the words of an act of Congress, relied on in argument, that the legislative department of the government of the United States had regarded the change of sovereignty as complete at the date of that treaty, to wit, October 1, 1800; and that France became from that moment the true sovereign of the province of Louisiana. A recurrence to the treaty itself, and to the history of the day, will show

clearly that such was not the intention of the contracting parties. It was stipulated by the treaty that the Duke of Parma should be elevated to the rank of king, under the auspices of the French Republic, with an extension of territory and an augmented number of subjects, and that his regal dignity should be recognized by the other crowned heads. By the third article, his Catholic Majesty promises and engages, six months after the full and complete execution of the conditions and stipulations relative to the Duke of Parma, to retrocede to the French Republic the province of Louisiana, with the same extent, &c. 'The treaty of Madrid of the 21st of March, 1801,' says the historian, 'renews these engagements, and the first article contains the detail of the conditions upon which the cession was made. It was specially stipulated that the reigning Duke of Parma, as an indemnity for that Dutchy, and its dependencies, and also in consideration of the cession which the King of Spain made of Louisiana, should be put in possession of Tuscany under the name of the Kingdom of Etruria.' These stipulations which could not be executed at that time, became afterwards the subject of many complaints on the part of Spain, and Louisiana remained yet for some time under its domination. Barbé Marbois. Hist. de la Louisiane, p. 185.

This last treaty spoken of by the historian has been little known, and, as well as that of the year 1800, does not appear to have been promulgated *in extenso* at that period, nor for many years afterwards. It is a matter of historical notoriety, that the spanish governors continued in the meantime to exercise all their authority, as if no such compact had been entered into, and that Spain continued *de facto* the sovereign of Louisiana. The terms of the treaty do not import necessarily a change of sovereignty *de jure*, but convey only the idea of a promise to cede the territory in full sovereignty, upon the performance of certain conditions precedent. The first authentic evidence, with which we are acquainted, of any admission on the part of the king of Spain, that such conditions had been performed by France, or of any act done towards the execution of the promise stipulated by the treaty of San Ildefonso, is contained in the *Cédula* or Royal Order of the 15th of October, 1802. The terms of this *Cédula* are inconsistent with the idea, that the sovereignty was already, by the compact of 1800, vested in the French Republic. It

recites, that whereas the King had thought proper to retrocede to France the territory and colony of Louisiana, the Intendant is ordered to put General Victor, or any other officer duly authorized by the French Republic, in possession of the colony, &c., 'in order that *henceforth the same may belong to said Republic*, and that she may cause it to be administered and governed by her own officers and governors, as her own possession, without any exception whatever.' The King proceeds to order an inventory 'to be made of all the effects belonging to the crown, with an appraisement, in order that their value may be reimbursed by the FrenchRepublic,and concludes by expressing his hope and confident expectation, that the inhabitants may continue and be protected in the peaceful possession of their property, and that all grants or property of whatever denomination, made by his governors, may be confirmed, although not confirmed by himself.' Will it be said, that this is but the expression of a hope or wish on the part of the King of Spain? It may be answered, that such, in reference to private property, is the law of nations, even in cases of conquest, and that France, by its subsequent treaty with the United States, responded to this appeal, and stipulated for the integrity of private property up to the date of the treaty of cession of 1803.

The subsequent acts of the Commissioners appointed on the part of Spain to deliver possession, confirm this view of the case. Governor Salcedo and the Marquis of Casa Calvo, who had been appointed for that purpose, in a public document dated the 18th of May, 1803, repeat the terms of the *Cédula*, under which they acted, and which have already been noticed; and the final surrender of the colony took place a few months afterwards, to wit, on the 30th of November, 1803. In the act of delivery, or protocol of the Commissioners on both sides, they declare that the French Commissioner is put in possession of the colony of Louisiana and its dependencies, &c., 'in order that the same may henceforth belong to the french republic, and be governed and administered by its officers and governors, in such manner as will best suit its interests; and that they have accordingly solemnly delivered to him the keys of the place, declaring that they absolve from the oath of fidelity to his said Majesty all such inhabitants as may choose to continue in the service or dependence of the French Republic.' Whether the change

of sovereignty took place at the date of the Royal Order of the 15th of October, 1802, or at the time when the inhabitants were absolved from their oath of allegiance, more than a year afterwards, is immaterial for the purpose of this argument. It is enough that the cession was not complete by the treaty of San Ildefonso, nor by that of Madrid of 1801.

If the validity of Guardiola's grant depended alone on the treaties of which we have been speaking, we should not hesitate to say that having been completed before the change of sovereignty, the land had become private property, and is to be protected under the treaty of cession to the United States.

But it is further urged that the grant in question is declared null and void by the 14th section of the act of Congress of the 26th March, 1804, entitled 'an act erecting Louisiana into two territories, &c.,' which declared that all spanish grants, subsequent to the date of the treaty of San Ildefonso, and all proceedings towards obtaining such grants, shall be held to be null and void. Without stopping to enquire into the authority of Congress to annul a grant reposing on the faith of treaties between other sovereign states, and one of them its own immediate predecessor, or how far the adjudicated cases referred to in argument would apply to a case within the acknowledged limits of ancient Louisiana, in the island of Orleans itself, we will content ourselves with remarking that, in our opinion, the grant in question is protected by the proviso to the section relied on, which saves all grants to actual settlers. It is shown that the land conceded to Guardiola, was inhabited and improved.

II. We come now to the second ground of defence, and to enquire how far the evidence in the record shows that the *locus in quo* had been granted by the french government before the cession of Louisiana to Spain. No such written concession is exhibited; but it is contended that the evidence sufficiently shows, that the surveyor general, Trudeau, was mistaken, when he certified that the land was vacant at the time Guardiola's patent was issued. If granted at all during the existence of the french authority, it must have been either to Le Breton in 1752, or to Latil in 1764. Let us examine each in succession.

First. The extent of Le Breton's grant is quite uncertain. Our knowledge of it is derived principally from his own declarations in

some of the documents in the record. We find him in 1757 selling to MadameD'Auberville six *arpens*, fourteen *toises* and four feet front on the bayou road, with the same depth, as a tract which the husband of the purchaser had acquired from Tourangeau, and adjoining it. The vendor reserves two *arpens* front, by the *depth which it has*, and adjoining on the other side land of the heirs of Morant. Supposing the front of Le Breton's land to have been eight *arpens*, fourteen *toises*, and four feet, and it being verv clear, that the side lines were parallel, and in a direction east and west, it is obvious that it could not cover the land in controversy. But we are satisfied that in point of fact the two *arpens* reserved, and which were afterwards given to Docminil Morant, did not adjoin the land of the heirs of Morant, but that there was a space of vacant land between the two tracts, which was subsequently granted to Latil, and which we shall have occasion to examine afterwards.

Le Breton, in 1758, made a donation to Docminil Morant of the two *arpens* reserved by him in his sale to Madame D'Auberville, and in the act of donation he described the land as having two *arpens* front, *avec la profondeur qui se trouvera*, adjoining on one side lands of the heirs of Morant, and on the other lands which Latil had purchased from Madame D'Auberville. The depth is left doubtful; but whatever it may be, the side lines must be taken as parallel to each other, and extending from east to west from the bayou road. The two *arpens* would not then cover the land in dispute. The expression, *avec la profondeur qui se trouvera*, implies less than forty *arpens*. The existence of this grant of Le Breton, and especially its original extent, is left very doubtful. Even the original survey has not been produced, nor accounted for. The whole rests principally upon Le Breton's own declarations, and it is not until his ratification of the donation to Docminil Morant, that he speaks of the depth of the two *arpens*, extending to Pradelles' land. In order to destroy the validity of a regular title, in form like that of Guardiola's, it does not suffice to render it probable that the land had been previously granted. Something more definite is required for judicial purposes. After the most attentive consideration we have been able to give to this part of the case, we conclude that Le Breton's pretensions to the land covered by the plaintiff's title, may be laid out of view.

Second. This brings us to consider Latil's grant. Here we have something more certain and definite. We have the grant, and a public survey, and the only question is as to the extent of the land conceded, and whether it crossed the canal Carondelet so as to cover the land granted to Guardiola.

Latil had purchased, it appears, the land of D'Auberville, already spoken of, and Madame D'Auberville had acquired of Le Breton, whatever may have been the original depth of his grant, only four *arpens* and twenty *toises* in depth west from the bayou road. On the other side there was the rear of the land of the heirs of Morant, of about the same front, and between these two tracts it was discovered that there was a vacant piece of land. This was granted in 1764 to Latil. A copy of the concession is before us, and is in substance as follows: "Upon the petition which Mr. Latil has made to grant him a *piece of vacant land* and not conceded, situated *between the minors Morant* and *the land which he declares to have purchased from the succession of D'Auberville*, all situated in this city, fronting on the bayou road, which leads to St. John. We by virtue of the power given to us by the King, and upon the petition and the certificate of the surveyor, Amelot, have conceded and do concede to him the said piece of land, *such as it may be found.*"

It could not be inferred from the expressions of this grant that the government intended to concede a small front upon the bayou road with a depth of forty *arpens*, or indeed any depth beyond the extent of the side lines, to wit: the back line of the land of the heirs of Morant, and the side line of the tract purchased by Latil of D'Auberville's succession. The piece of land was granted *such as it was*, between two given boundaries. If the back line was left uncertain, or rather was not given, it is not difficult to ascertain what it was. If we go beyond the back corner of Morant's tract in the direction of the back line, and beyond the back corner of the D'Auberville tract to an indefinite extent, and close the lines, we evidently enclose land not between the two given boundaries. It is more reasonable in itself, and more consonant to the terms used in the grant, to suppose that the back line of the grant was intended to run from the back corner of the Morant tract to that of Latil's purchase from D'Auberville. This mode of laying

it off would give a trapezium, as the piece of land is called in some of the authentic documents in the record. The survey made by Devezin does not give any definite depth, and is not inconsistent with the view now expressed.

The extent of Latil's land in the rear appears always to have been a subject of doubt. Trudeau, the surveyor general, in his notes in explanation of his plan of the city of New Orleans, and its environs, upon the faith of which the grants of Suares, Vidal, and Guardiola appear to have been made, says, 'these lands of D'Auberville passed afterwards into the hands of Mr. Alexander Latil, who on the 6th of August, 1764, obtained the grant of a remnant of land, (*un reste de terre*,)' between that acquired from D'Auberville and that of Mr. De Morant. This concession speaks neither of front nor of depth, but only of a remnant of vacant land. Mr. Latil was then proprietor of four *arpens* and twenty *toises* sold by Tourangeaud, eight *arpens* and fourteen *toises* and four feet sold by Le Breton, and one *arpent* and twelve *toises*, the remnant of land granted to him, in all thirteen *arpens*, sixteen *toises* and four feet front on the bayou road. By means of a change in the direction of the lines, Latil sold eighteen *arpens* front on the bayou road. These eighteen *arpens* were measured and bounded, (I presume by Mr. Olivier Devezin,) each proprietor enjoying quietly, each his respective share, but all the possessors in good faith believed themselves entitled to the land in the rear. As there remains too much doubt as to the depth of these lands, it appears to us justice would be done to all by extending them to within sixty feet of the canal Carondelet.

This act of the surveyor general giving to the vague pretensions of the various grantees in the rear, a more definite location, has been ingeniously criticised at the bar; but so far as it relates to Latil's grant it appears to have been sufficiently liberal, and so far as we are informed, acquiesced in by all parties concerned. We cannot perceive how the grant of Latil could be laid off in conformity to its terms, so as to cross the canal Carondelet, and interfere with the grant in favor of Guardiola.

Whether therefore, we consider the defendant as holding under Le Breton, or under Latil, neither title will, in our opinion, avail her. The side lines of Le Breton's grant, whatever may have been

its original depth, evidently ran east and west from the bayou road, and consequently could not embrace the *locus in quo*; and there is nothing in the record to satisfy us that Latil's grant was ever considered by him, or by the officers of the crown, as extending south of the Canal Carondelet.

The plea of prescription is not, in our opinion, supported by the evidence, and was properly overruled.

Judgment affirmed.

SAME CASE—ON A RE-HEARING.

The proviso in the fourteenth section of the act of Congress of the 26th of March, 1804, erecting Louisiana into two territories, and providing for the temporary government thereof, contemplates two classes of titles: *first*, those granted according to the ordinances and usages of the spanish monarchy to heads of families, on the usual condition of settlement on the lands granted, provided such condition had been complied with before the cession to the United States; *secondly*, such as were applied for after the settlement had been made, commonly called permissions to settle with a *Requêta*. In both cases, we are to look to the usages of the spanish monarchy for the definition of an *actual settler*, rather than to subsequent acts of Congress providing for pre-emptions in favor of persons who may have *settled* upon, *inhabited*, and *cultivated* a part of the public domain. This proviso recognizes the authority of Spain to make certain grants, after the date of the treaty of San Ildefonso. Congress has never treated the question as exclusively a political one, nor decided that the sovereignty of Louisiana was changed at that period.

Soulé, *Derbigny*, and *Janin*, for the appellant.

Preston, for the plaintiff. 1. Grants by a government *de facto* of parts of a disputed territory in its possession, are valid against the state which had the right. 2. Where territory is acquired by treaty, or even by conquest, the rights of the inhabitants to private property, are always respected. 12 Peters, 748, 749.

BULLARD, J. A re-hearing was allowed in this case upon the single question, whether the grant to Guardiola, which was subsequent to the 1st of October, 1800, the date of the treaty of San Ildefonso, was protected by the proviso to the 14th section of the act of Congress of 1804, entitled 'an act erecting Louisiana into

two territories, and providing for the temporary government thereof.'

That section declares, 'that all grants for lands within the territories ceded by the french republic to the United States by the treaty of the 30th of April, in the year 1803, the titles whereof were at the date of the treaty of San Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining of any grant, title, or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be and to have been from the beginning, null, void, and of no effect in law or equity: *Provided nevertheless*, that anything in this section contained shall not be construed to make null and void any *bonâ fide* grant, made agreeably to the laws, usages, and customs of the spanish government to an actual settler on the lands so granted for himself, and for his wife and family; or to make null and void any *bonâ fide* act or proceeding done by an actual settler agreeably to the laws, usages, and customs of the spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the 20th day of December, 1803,' &c.

The proviso above recited contemplates two classes of titles: *First*, those granted according to the ordinances and usages of the spanish government, upon the usual condition of settlement upon the lands so granted, to heads of families, provided such condition was complied with before the cession to the United States; and *secondly*, such as were applied for after the settlement was made, commonly called permissions to settle with a Requêta. In both cases we are to look, in our opinion, to the laws and usages of the spanish government for the definition of an *actual settler*, rather than to subsequent acts of Congress which provide for pre-emptions in favor of such persons as shall have *settled* upon, *inhabited*, and *cultivated* a part of the public domain. This proviso recognizes the authority of Spain to make certain grants after the date of the treaty of San Ildefonso, and therefore it cannot be said, that Congress has treated this as exclusively a political question, and absolutely decided, that the sovereignty was changed at that period. The only doubt is,

whether Guardiola can be classed in either of the categories expressed in the act of Congress. He exhibits a title in form to a small tract of land, which was appertinent to another tract already owned and possessed by him. The Intendant of the province, in the preamble to his patent, states him to be a resident of the city, and owner of a piece of land on the bayou road, where he has his dwelling, which property is deficient in depth to graze his cattle upon. It is for these reasons, that a small additional grant is made to him. This was done in conformity with the existing ordinances relative to the distribution of the public domain. Guardiola was certainly regarded by the intendant as *actually settled* on the land, to which his new grant was but an appendage; and although the expression, used in the opinion of the court first pronounced, that the grant was *inhabited* and *improved*, was perhaps not strictly accurate, especially with reference to subsequent acts of Congress defining rights of pre-emption, yet substantially we consider the grant to Guardiola as embraced in the proviso which protects actual settlers before the cession to the United States; and we cannot suppose Congress intended by the act in question, or by any subsequent legislation, to declare null and void those small grants, made *bonâ fide*, according to the usages of the spanish government, to inhabitants of the province, to meet the wants of a growing population.

The re-hearing being confined to this question, we have not thought it our duty to follow the counsel for the defendant in his argument upon other questions connected with this cause, nor to examine how far, upon other points, our view of the case differ from that of the highest tribunal in the Union. Looking upon Guardiola's grant as one made in good faith, according to the usages and ordinances of the Spanish government, and as having become private property, according to those laws and usages, and according to the treaties between France and Spain, and the law of nations, we consider it protected not merely by the proviso to the act of Congress first recited, but by the treaty of cession.

It is therefore considered that the judgment first pronounced, remain undisturbed.

David T. Ross v. John L. O'Nail.

Parol evidence is inadmissible to prove the intention of the parties at the time of entering into a written contract. But it may be received to prove a subsequent agreement, to grant an authority not conceded in the original contract.

Appeal from the District Court of Iberville, *Nicholls, J.*

Martin, J. The plaintiff, lessor of the defendant, claims damages for waste committed on the premises leased, by cutting down and hauling wood to be sold to steam boats. One hundred and eighty cords of wood were sequestered. The defendant justified under a verbal permission from the plaintiff, his lessor, on whom he reconvened for damages sustained by the seizure and sequestration of the wood, a part of which was ready for sale. There was a verdict and judgment for the defendant, for the wood which had been cut, and for one hundred dollars damages, and the plaintiff appealed.

Our attention is first drawn to a bill of exceptions to the opinion of the court, overruling the plaintiff's objections to the introduction of parol evidence to contradict the written lease, on the ground that leave to cut wood must be shown by the lease, and that no subsequent parol agreement could be proved. The court was of opinion that the parol evidence did not contradict the lease, in which there was nothing restraining the lessee in the use of the premises; and that the intended use of the property, not being stated in the lease, the lessee had a right to introduce oral evidence of the use which was intended by the parties, or of a subsequent permission given by the lessor.

It appears to us the court erred. Parol evidence might indeed be well received of the subsequent agreement, under which the lessee claims authority to cut wood; but it ought not to have been admitted to show that such an authority resulted from the intention of the parties at the time they entered into the contract, of which the written lease is the evidence.

The record shows that under this opinion of the District Court, parol evidence was introduced of conversations and declarations of the parties, by which the lessee sought to establish, that according to the intention of the parties at the time of the execution of

the lease, and under the subsequent permission of the lessor, the lessee was authorized to cut wood from the premises. As the case was tried by a jury, and it is impossible to determine to what part of the evidence they gave credit, the case must be remanded.

It is therefore ordered, that the judgment be reversed, the verdict set aside, and the case remanded for further proceedings according to law; with directions to the judge not to admit parol evidence of any authority in the lessee to cut wood, resulting from the intention of the parties at the execution of the lease. The appellee paying the costs of appeal.

Edwards, for the appellant. No counsel appeared for the appellee.

Maria, and another v. William E. Edwards, Executor, and another.

Article 1576 of the Civil Code, which provides that in the country it suffices for the validity of nuncupative testaments, under private signature, that they be passed in the presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of that place, provided that a greater number cannot be procured, does not contemplate a physical or absolute impossibility. Reasonable diligence to procure the witnesses, is all that is required.

The formalities and conditions required by law for the emancipation of slaves, cannot be dispensed with by a testator who orders his slaves to be set free, any more than by a master who desires to emancipate them during his life time.

Appeal from the District Court of Iberville, *Nicholls*, J.

Morphy, J. The petitioners sue for their freedom under the last will of the late James Goodbee. The evidence in the case shows that on the 5th of December, 1838, a sealed olographic will of the deceased was presented to the Court of Probates of the parish of Iberville. It was, in due course of law, opened, proved, and ordered to be executed. On the same sheet of paper, and below the olographic testament, which bears date the 11th July, 1838, there was an instrument of writing purporting to be a codicil

to the same, dated the 14th of November, 1838, and signed by the deceased in the presence of four witnesses. Of this instrument, which grants to the petitioners their freedom, no notice whatever was taken by the Probate judge, either because it was overlooked, or more probably because he took it for granted that being signed only by four witnesses, it was of no account, and necessarily null. The first will having been duly proved, the defendant, Edwards, was appointed executor, and caused the petitioners to be exposed for sale, with other effects and property of the estate, when they were purchased by his co-defendant, Webb. Subsequent to these proceedings, on the 30th of April, 1840, R. P. Bowie, one of the subscribing witnesses to this codicil, presented a petition to the Probate Court, praying that this instrument might be recognized as the last will and testament of James Goodbee. The four subscribing witnesses were summoned, their testimony reduced to writing, and the will ordered to be recorded and executed. The present suit was then brought, wherein there was judgment below for the plaintiffs. The executor alone appealed.

The only question to be determined is, whether this case comes within the exception established by article 1576, in relation to the number of witnesses required for nuncupative wills, under private signature, when made in the country? The general rule, as provided by article 1574, is that testaments of this kind must be made in the presence of five witnesses, residing in the place, or of seven residing elsewhere. The above mentioned exception declares, that with regard to wills made in the country, three witnesses residing in the place, or five residing elsewhere, will suffice, provided a greater number of witnesses cannot be had. The testimony shows that at the time of the execution of the last mentioned instrument, the situation of the testator was considered by his physician as extremely precarious. He had been very ill for some time past, and was then in the last stage of a dropsy, which might have caused his sudden death. These apprehensions of the physician are shown to have been well grounded, by the fact of the testator dying the very day after the will was made. The parish judge was sent for to make a will. Being unable to attend, he sent word that a will could be made without his presence, if attested by five witnesses, but that four would be sufficient, if a greater number could not be

procured. In consequence of this suggestion, several fruitless attempts were made to obtain the necessary number of witnesses. It is true that several competent witnesses are proved to have been in the neighborhood, but although some were sent for to complete the requisite number, they did not attend, and there was no means of coercing their attendance. The testator was in a dying condition, and anxious to make his will. There being no hope of obtaining an additional witness on that day, the will was executed in the presence of four witnesses only, and the testator died the following day. Had the testator lived several days after, this will could not perhaps have been considered as valid, because another might have been made with the necessary number of subscribing witnesses. But under the circumstances of this case, we are satisfied, with the Probate judge and the court *a qua*, that a greater number of witnesses could not be obtained. Article 1576 does not contemplate a physical or absolute impossibility; reasonable diligence to procure the witnesses is all that is required. 1 Martin, N. S., 488. 12 La., 483. The decree of the District Court, however, appears to us to go too far, when it adjudges the petitioners to be absolutely free. There are certain formalities to be fulfilled, and certain conditions required by the laws of the state for the emancipation of slaves, which cannot be dispensed with when a testator orders his slaves to be set free, any more than when a master during his life time wishes to emancipate them. Civ. Code, art. 185. 1 Bullard and Curry's Digest, 428, 429, and 430.

It is therefore ordered that the judgment of the District Court be reversed; and that the slaves Maria and George Joseph be declared to be entitled to their freedom under the will of the late James Goodbee, and that the executor take the necessary steps to have them emancipated according to law; the appellees to pay the costs of this appeal.

This case was argued, *ex parte*, by *Labauve*, for the appellant.

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AUGUSTE LANDRY v. HONORÉ FELIX GAMET.

It is not necessary that the purchaser should be actually dispossessed, to constitute an eviction. It may take place where he continues to hold the property, if under a different title from that transferred to him by his vendor, as where he inherits it, or acquires it by purchase from the true owner.

Where a tract of land purchased by defendant from the plaintiff, was seized and sold for a debt due by the latter, as curator of a minor, and defendant became the purchaser, *held:* that defendant continued to hold under the title of his original vendor, the sheriff's deed purporting to transfer to him nothing more than the title of the latter, and that such purchase cannot be viewed as an actual eviction, authorizing the vendee to refuse the payment of the price, or to recover it back when paid; and that it can give him no other or greater rights than he would have had, if, to avoid being dispossessed, he had paid the debt of his vendor; in which case he would have had an action of warranty for the reimbursement of the amount paid.

Though it may well be doubted whether, in a regular hypothecary action, the party in possession is bound to give notice of the seizure to his vendor, as demand must be made of the principal debtor thirty days before resorting to the mortgaged property in the hands of a third possessor, which may be considered as sufficient notice, yet where the property is seized in the hands of the latter, under the decree of a court having no jurisdiction to order said seizure, *ratione materiæ*, it will be his duty to resist such illegal process, or to notify his vendor.

An answer, changing the issue, offered to be filed after the case has been fixed for trial, will not be received.

APPEAL from the District Court of Iberville, *Deblieux*, J.

MORPHY, J. This suit is brought to recover the price of property sold to the defendant, by two different sales, executed to him in the years 1829 and 1830. Although the pleadings set up various means of defence, the only one relied on in argument, and which it is necessary to mention, is, that defendant has been evicted in consequence of a legal mortgage existing on the property sold, in favor of one Alexis Brasset, of whom the plaintiff had been curator *ad bona*, long before these sales. There was judgment below for $6250 against the defendant, from which he appealed.

This case came before the court in March, 1836, and was then remanded with instructions to the judge *a quo*, not to reject the record of the suit in the court of probates of *Alexis Brasset* v. *Auguste Landry*, which had been offered in evidence by the defendant, and been rejected. From the proceedings had in that suit it appears, that in 1827 the plaintiff had given a special mortgage

on the tract of land afterwards sold to the defendant, for surety of his administration as curator *ad bona* of Alexis Brasset. That on the 4th of January, 1832, the latter obtained against the plaintiff a judgment for $1500 in the Court of Probates, ordering the property thus mortgaged to be seized and sold, as if it were still in the possession of Auguste Landry. To this proceeding Gamet made no objection, nor did he give notice to his vendor of the seizure. The property was bought in by himself, at twelve months' credit, for the sum of $1650, being about one-fifth of its real value. It is contended, on the part of the appellant, that this sale amounts in law to an eviction of all the titles transferred to him by Landry, and that he no longer holds under those titles, but under the sheriff's sale to him, pursuant to the decree of the Court of Probates. It is true that by the authorities to which we have been referred, the doctrine is well established, that in order to constitute an eviction, it is not absolutely necessary that the purchaser should be actually disposesssed. That eviction takes place, although the purchaser continues to hold the property, if it be under a title which is not that transferred to him by his vendor; as if he should inherit the property, or should acquire it by purchase from the true owner. Pothier, Vente, No. 96. Troplong, Vente, No. 415. Toullier, Vol. 16; Continuation by Duvergier, Vol. 1, Nos. 309, 313. It appears to us that these authorities do not contemplate a case like the present. By buying in the property, when seized at the suit of Alexis Brasset, Gamet continued to hold, and yet holds under the title of Landry, for the sheriff's deed purports to transfer to him nothing more than the right, title, and pretensions of his own vendor. This purchase cannot, in our opinion, be viewed as an actual eviction, authorizing Gamet to resist the payment of the price, or to recover it back, had it been paid. It cannot give him any other or greater rights than he would have had, if to avoid being dispossessed, he had paid the debt of his vendor; in which case he would have had a claim or action of warranty for the reimbursement of the amount, thus paid to prevent eviction. Civ. Code, 2373. Pothier, Vente, No. 83. *Johnston* v. *Bell et al.*, 6 Martin, N. S., 386. But even if by reason of this seizure, and sale to himself, defendant could be considered as evicted, such an eviction, under the circumstances of this case, could not enable him to resist the pay-

ment of the price. From the testimony before us, and the acts and declarations of the defendant, we have received the impression, that he had beforehand made an arrangement, and come to an understanding with the seizing creditor, Alexis Brasset, to cause himself to be evicted, so as to evade the payment of the price. It is not pretended that the defendant gave any notice of the seizure to his vendor. In a regular hypothecary action it may well be doubted, whether any such notice is at all necessary under our laws, because the demand required to be made of the principal debtor, thirty days before resorting to the mortgaged property in the hands of the third possessor, may be considered as a sufficient notice to the former. If, after this demand, he does not come forward and discharge the mortgage, which threatens his vendee with eviction, it must be, because he is unable or unwilling to do it. But be this as it may, it is clear, that when this property was seized in Gamet's hands, under a decree of the Court of Probates, which had no jurisdiction, *ratione materiæ*, to order such seizure, it was his duty to resist this illegal proceeding, or at least to notify the plaintiff, who might have paid the debt or enjoined the proceeding. Instead of doing this, the defendant suffered the property to be exposed for sale, bought it himself for a small sum, and settled for the amount by means of arrangements previously made with the seizing creditor. It is clear that such proceedings cannot justify him in resisting the payment of the price; but as he discharged a debt due by the plaintiff, his right to recover it must be reserved. We cannot allow it in compensation or reconvention in this suit, under the pleadings exhibited by the record. An amended answer, it is true, was offered by the defendant, setting up this claim and other means of defence, after the case had been set for trial. The judge, in our opinion, correctly refused to admit it, as it was not offered in proper time, and as it changed the issues upon which the parties were about proceeding to trial.

It is therefore ordered, that the judgment of the District Court be affirmed with costs; reserving the defendant's right to sue for any sum paid by him on account of the plaintiff, in consequence of mortgages existing on the property sold to him.

Argued, *ex parte*, by *Labauve*, for the appellant.

HÉLÈNE PORCHE v. THEOPHILE L'ADMIRAULT.

THE defendant is appellant from a judgment of the District Court of Pointe Coupée, *Nicholls*, J., rescinding the sale of a slave.

BULLARD, J. This is a redhibitory action, in which the plaintiff seeks the rescission of the sale of a slave, on account of a malady pronounced by physicians to be a pulmonary consumption. The plaintiff alleges that about two months after her purchase the slave was taken sick, when she was examined by physicians, who assured her that the slave had been subject to the disease anterior to her purchase. That she offered the vendor to restore the slave, and cancel the contract, but that he refused. She further alleges that the disease is incurable, and that her service is so interrupted that she is of no value, but rather a burden to her.

The answer of L'Admirault, the nominal, and that of the intervenor, Benjamin Poydras de Lalande, the real vendor, deny the existence of the disease at the time of the sale.

It being alleged in the petition that the girl fell sick two months after the sale, it is incumbent on the plaintiff to prove that, although apparently in good health at the time, the slave was in fact laboring under the disease stated in the petition. For this purpose she produced Dr. Smith as a witness, who testified that he had been the family physician of Mr. Beauvais, the former owner, and that he had given him his opinion that the girl was predisposed to tuberculous consumption, although he had never treated her for that disease. That he saw the girl afterwards at the plaintiff's, and examined her chest by percussion and by the stethoscope, by which examination he detected hepatization of the lungs, which may exist in consequence of inflammation, without tubercles.

Dr. L'Admirault, on the other hand, considers the disease under which the slave is laboring as bronchitis, combined with chronic gastritis, that is to say that the mucous membranes of the stomach and bronchia are in a state of irritation; and this appears to have been her condition at the time of the trial. But, he adds, that her condition in July, was not such as to induce him to conclude that she was sick in March, the time of the sale.

Dr. Donallen saw her in July, 1840, and thought she was laboring under a pulmonary disease, but did not examine her with instruments. She was also affected with a suppression of menstruation.

Dr. Ferrier had also been the family physician of Mr. Beauvais, and knew the servant; and does not confirm Dr. Smith's opinion as to her tuberculous diathesis. He examined her afterwards twice, at the plaintiff's request, the last time with the stethoscope, and that examination did not disclose any serious injury. He did not pursue his enquiry far enough, to satisfy himself whether there existed any induration or hepatization of the lungs.

The evidence leaves it doubtful whether the disease existed at the time of the sale, or whether it originated afterwards, and whether there is a probability of her recovery. The medical works which have been looked into for information on this subject, to wit, Jackson's Principles of Medicine, *Clinique Medicale* by Andral, and *Recherches sur la Phthisie* by Louis, have failed to dissipate, if they have not confirmed those doubts. The time which has elapsed since the first trial will have tended to elucidate this mystery, by exhibiting a further development of the disease, or a favorable change, which it appears was possible. Justice therefore requires, we think, that the case should be remanded for a new trial. In the present state of the case, the plaintiff has not made her case sufficiently certain to justify a judgment in her favor.

The judgment of the District Court is therefore reversed, and the case remanded for a new trial. The costs of this appeal to be paid by the plaintiff and appellee.

Janin, for the appellant. No counsel appeared for the appellee.

ADELINE TERRELL v. ISAAC W. CUTRER, Syndic.

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Parol evidence is admissible to prove that slaves, purchased by a married woman, were paid for out of her paraphernal funds, though not so stated in the act of sale. Such evidence is not repugnant to the deed.

A married woman having the right to resume, at any moment, the administration of her paraphernal property, it is unnecessary to prove that she had the actual administration at the time that she expended a part, with her husband's consent, in the purchase of other property, that act itself being one of administration.

Where the wife retains the administration of her paraphernal estate, and the title is taken in her name, either as a purchase with funds which she administers without the assistance of her husband, or as a *dation en payement* made to her by a debtor of a separate and paraphernal claim, the property remains paraphernal, and does not fall into the community of *acquêts et gains*.

A wife's right to reinvest the proceeds of paraphernal property sold by her, is but a corrollary of her right to administer, or to sell, or otherwise alienate it. Such contracts may be made by act *sous seign-privé*; no law requires that they should be made by authentic act.

APPEAL from the District Court of St. Tammany, *Jones*, J.

Janin, for the appellant, contended that a married woman who wishes to invest her separate funds in the purchase of property, must, in order to prevent its becoming a part of the community, declare by *notarial act* that she purchases for her sole account, and from what source she obtained the money given in payment.

G. Strawbridge, *contra*. It is enough that she take the title in her own name, provided she afterwards prove that the price was paid out of her own means. The purchase of separate property, may be made as well by private as by authentic act.

BULLARD, J. The plaintiff claims as her own property two slaves surrendered by her husband to his creditors, and the syndic is appellant from a judgment which recognizes her title.

The facts appear to be, that the plaintiff was entitled to a certain sum in the succession of her father, which constituted her paraphernal property. That this sum was received by her husband during the marriage; and that in 1834 she purchased one of the slaves in her own name, of one Simmons, and that the other was purchased by her agent in Kentucky, in the year 1833; and that both were paid for out of the funds in the hands of her husband, derived from her father's estate.

On the trial, it was objected that parol evidence was inadmissible to prove that the slaves were purchased with paraphernal funds; and the defendant took a bill of exceptions to its admission notwithstanding his objections. It was objected to on the ground that such proof was against and beyond what was contained in the written contract, and could not be introduced without showing that the wife was in the actual administration of her paraphernal property.

The court, in our opinion, did not err in admitting the evidence. It does not appear to us that the evidence, that the price stated to have been paid, was in fact paid out of the proper funds of the wife, is repugnant to the deed itself; and as the wife has at any time the right of resuming the administration of her paraphernal property, and it belongs legally to her, we see no necessity for proving that she had the actual administration at the time that she appropriated a part of it to the purchase of the slaves, with her husband's consent. That act alone was one of administration, and was done with the consent of the husband. The bare receipt of the money by her husband, does not alone show that she had confided to him the administration. On the contrary a part of it was employed by her agent in Kentucky, under her orders, and was invested in the purchase of one of the slaves in dispute. If the slaves had died, and the wife had claimed of the syndic, as a debt due her, the amount derived from her father's estate, we think, under all the circumstances of this case, that she could not have recovered; because the investment of the amount by her, even during the marriage, would be considered as a valid contract. It is difficult to find any real distinction between this case and that of *Dominguez* v. *Lee*, 17 La., 300. In that case we held, that when the wife retains the administration of her paraphernal estate, and the title is taken in her name, either as a purchase with the funds which she administers without the assistance of her husband, or as a *dation en payment* made to her by a debtor of a separate and paraphernal claim, the property thus acquired remains paraphernal, and does not fall into the community of *acquêts et gains*.

We readily admit that the subject is not free from difficulties, growing out of the very general dispositions of the law applicable to such cases. The wife's right to sell, or otherwise alienate, and to administer her paraphernal property, is clear. Her right to

re-invest the proceeds of her property thus disposed of, would seem to be but a corollary from that principle. It would perhaps be a safe and proper precaution to require that such contracts should be by authentic act, as contended for by the defendant's counsel; but we are not aware that any law requires it, and we have never recognized its necessity to their validity. It is certainly of their essence that the wife herself should make the purchase legally, while in the administration of her paraphernal property, and that it should be a *bona fide* re-investment of money under her control, and forming a part of her paraphernal property, or a *dation en payement*. Such contracts, under private signature, might more readily be supposed to be antedated by collusion between husband and wife. But in the present case we see nothing suspicious. The purchases were made many years before the surrender by the husband, and so sar from his colluding with the wife, the slaves were placed on his bilan as his own property.

Judgment affirmed.

MERRIT GRANDISON KEMP, and others, Heirs, v. ABNER WOMACK.

Where both parties claim under the same person, neither can dispute his title.

A remission, in the court below, of the amount of damages allowed by the jury, will stop the party from setting up any claim for damages in the appellate court.

A and B sue as heirs, and judgment in favor of A and against B. Defendant alone appeals, alleging in his petition that he complains only of so much of the judgment as was in favor of A. On the trial of the appeal, B intervened. *Held*, that not having appealed, he cannot interfere without the consent of the defendant: and that so much of the judgment only as was in favor of A, is before the court.

APPEAL from the District Court of St. Helena, *Jones*, J.

J. P. Bullard, for the plaintiffs.

Preston, for the appellant.

GARLAND, J. Merrit Grandison Kemp, and Virginia Caroline Kemp, represent themselves as the legal heirs of David Kemp, deceased, by right of representation of their father, Thomas Kemp, deceased, who was a brother of David. They claim one undivided fifth of a number of slaves in possession of the defendant, and the

value of their services for six years and six months, previous to the institution of this suit, which they say was five hundred and twenty dollars. The defendant says, that neither the plaintiffs, nor those under whom they claim, ever had any right or title to the negroes described in the petition. He further avers, that he has had open, unequivocal, and public possession of said slaves as owner, for upwards of nineteen years, without interruption; wherefore he pleads the prescription of five, ten, and fifteen years.

The evidence shows that the slaves in controversy, or those from whom they descended, were in the possession of David Kemp as owner, previous to his death, about the year 1820. He had inherited one or more of them from Jonathan Kemp, who died possessed of them as owner. After the death of David Kemp, the slaves went into the possession of Isaac Kemp, from whom the defendant got them in a manner not clearly explained, though it may be inferred, by purchase, as a witness says that he told defendant, after he had made the first payment for the slaves to Isaac Kemp, that he had better not pay the balance, until the estate of David Kemp was settled, as the title might not be good, if that estate should prove insolvent. It is further proved, that the defendant has been in open and undisguised possession since the year 1821. The plaintiffs were minors at the death of David Kemp, one of them being born about Christmas, in the year 1817, the other about two years previous.

The heirs of Asa Kemp, another brother of David Kemp, were also plaintiffs in this suit. In relation to them, besides the facts already stated, it is in evidence that they were never residents of this state, and were of age at the time of the death of their uncle, whose heirs they claim to be.

There was a verdict and judgment in favor of the heirs of Thomas Kemp, for one-fifth of the slaves in possession of the defendant, and for thirteen dollars and thirty-three cents damages as hire; and against the heirs of Asa Kemp. The latter moved for a new trial, which was overruled. The defendant appealed from so much of the judgment as was in favor of the heirs of Thomas Kemp. The heirs of Asa Kemp have taken no appeal, but appear in this court, and claim a reversal of the judgment against them, and ask for a judgment in their favor for one-fifth of the property in contro-

versy. Previous to signing the judgment, the plaintiffs, M. G. and V. C. Kemp, entered a remission of the damages in favor of the defendant.

There is no question raised as to the heirship of the plaintiffs representing Thomas Kemp, or as to his being a brother of David, who died without ascendants or descendants. That the slaves were in the possession of David Kemp as owner, at the time of his death, is, we think, clearly shown; and that the defendant acquired them through Isaac Kemp, another heir, is equally clear. The defendant exhibits no title, but relies upon the objection, that the plaintiffs show no legal title in David Kemp, and the prescription of fifteen years.

As to the first objection, we are of opinion, that the evidence shows, that the slaves were in the possession of David Kemp, as owner, at the time of his death. He is therefore the author of the titles under which both parties claim, and neither can dispute his title, according to the well settled principles of our jurisprudence. 1 Martin, N. S., 577. 4 Ib., 402. 2 La., 209-213. 8 La., 234, 241.

The defendant relies upon articles 3465, 3466 of the Civil Code, to sustain his plea of prescription, and he would be protected by them, if no cause were shown to suspend or interrupt the prescription. But it is proved, that Merrit G. Kemp did not arrive at the age of majority until the month of December, 1836, and his sister not until about two years thereafter. This suit was commenced on the 30th of April, 1841. These plaintiffs are therefore within the article 3488 of the Code, which suspends the prescription as to them during their minority. This view of the case renders it unnecessary to consider, what effect the institution of the suit for partition, commenced in 1834, between these and other parties, may have upon the question.

The counsel for the plaintiffs has insisted, in this court, upon having the judgment amended in their favor, so as to allow hire for the slaves, from the time the suit was commenced in the Probate court, in 1834, as they say that the defendant was a possessor in bad faith from that time. Upon this point, it is only necessary to observe, that the plaintiffs have, in our opinion, renounced their claim for damages or hire, by entering a remission of the amount allowed by the jury that tried the cause.

As to the plaintiffs, claiming as heirs of Asa Kemp, we do not think that they are properly before us. They have taken no appeal from the judgment rendered against them. The defendant, in his petition of appeal, says that he complains only of that portion of the judgment which is in favor of the heirs of Thomas Kemp, and that only is before us. There is no law to authorize such an interference, as is claimed by Asa Kemp's heirs, without the consent of the defendant. The law prescribes a mode, by which they can obtain redress, if they are entitled to it; but they cannot do so, in the mode in which they now seek it.

Judgment affirmed.

Henry Landry v. Auguste Gautreau.

The act of Congress of the 3rd of March, 1811, providing for the final adjustment of land claims, and for the sale of the public lands in the territories of Orleans and Louisiana, revived by the act of the 11th of May, 1820, and the act of the 15th of June, 1832, authorizing the inhabitants of the state of Louisiana to enter back lands, continued in force by that of the 24th of February, 1835, authorize the purchase of any *vacant* land, in the rear, *not exceeding* the quantity in the front tracts, leaving it to the discretion of the party to purchase any quantity he may desire within the prescribed limits. But when such party has made his election, and purchased the quantity he desired, though less than he was entitled to claim, he cannot afterwards assert his original rights, to the prejudice of innocent third persons, acting in good faith, and claiming under other laws. Nor will it suffice to allege that he acted through error, and purchased less than he was entitled to buy, in consequence of mistaking the number of acres in his front tract. It was his duty to have ascertained the number of acres it contained, and not having done so, within the time prescribed by the acts under which he purchased, his right of pre-emption was lost.

The act of Congress of the 15th of June, 1832, is not a renewal of any previous act. It is an independent provision, in favor of those who had not had the benefit of former laws, and includes an entirely new class of cases not before provided for.

Where an applicant for the purchase of certain public lands, under an act of Congress authorizing the sale of such lands *when vacant*, does not disclose to the Register of Public Lands or to the Receiver of Public Moneys the fact, that they were occupied at the time of his application, the validity of the sale may be inquired into, without any previous proceeding on the part of the United States to annul it. The court is bound to presume that the officers of the government would not have sold the lands, had they known that they were occupied, and to declare the sale a nullity.

THE plaintiff is appellant from a judgment of the District Court of Assumption, *Nicholls*, J., in favor of the defendant.

Beatty, for the appellant.

Ilsley, for the defendant.

GARLAND, J. The plaintiff being the owner of a tract of land of four *arpens* front, by forty in depth, confirmed to his vendor, Armand Landry, on the bayou Lafourche, on the 22d of February, 1822, purchased from the Register of the Land Office, and the Receiver of Public Moneys at New Orleans, an equal quantity, viz., one hundred and forty seven superficial acres, in the rear of and adjacent to his front tract, under the provisions of an act of Congress, approved the 3d of March, 1811, and revived for two years, by the seventh section of another act, approved May 11th, 1820. 1 Land Laws, 588, 779. These acts authorized the owner of a tract of land fronting on a water-course, under certain restrictions, to become a purchaser, by preference, of any *vacant land* in the rear of and adjoining his front tract, not exceeding forty *arpens* in depth, by the superficial quantity contained in the front tract. When this purchase was made, the plaintiff now alleges, that he supposed his front tract contained only one hundred and forty seven superficial acres, but that he has discovered that, in onsequence of his side lines opening, it contains forty seven acres and six-hundredths more, although his confirmation is only for four *arpens* front by forty deep, equal to one hundred and forty seven acres. At what time the plaintiff discovered the deficiency in the quantity of land he was entitled to purchase, does not appear, but on the 1st of June, 1836, he applied to the officers at the same land office, to become the purchaser of these forty seven acres and six-hundredths of land, under the provisions of another act of Congress, approved June 15th, 1832, entitled, 'an act to authorize the inhabitants of the state of Louisiana to enter back lands,' 8 Laws U. S., 595, which act, by another passed on the 24th of February, 1835, was extended to the 15th of June, 1836. In the application to purchase, the plaintiff bases his claim upon the act of 1832, and not upon those of 1811 and 1820, under which he entered the first tract. The application was granted, and the plaintiff purchased for $58 83 the land in controversy.

In 1832, the defendant commenced working on the land. In 1833,

he settled on it, and remained with his family and that of his brother, until the 15th June, 1836, when for himself and the minor children of his brother, he also applied to the land officers in New Orleans, to purchase a quantity of land, which includes the *locus in quo*, under the pre-emption law of June, 19th, 1834; which application was granted, upon proof of settlement and cultivation being made in conformity to law, and a receipt in due form was given him, under which he now claims the premises.

The plaintiff contends that under the acts of Congress of 1811 and 1820, he was entitled to purchase a quantity of land, equal to his front tract, and that not having done so at the time, he had a right to a preference in purchasing the deficiency, whenever it should be discovered. If not so, he contends that the act of Congress of June 15th, 1832, and the extension of it by the act of February 24th, 1835, revived his right, or granted a new privilege. As to all these acts, it is to be observed that they authorize the purchase of a quantity of *vacant* land in the rear, not *exceeding* the quantity contained in the front tract. This, we think, leaves the party a discretion as to the quantity of vacant land he may enter or purchase, and having once made his election, he cannot afterwards change his mind, and claim his original rights to the prejudice of innocent third persons, acting in good faith, and claiming under other laws. The plaintiff, in the first instance, may have chosen only to enter the quantity he did. He now says, it was an error, as his front tract was not surveyed, and he did not know the superficial quantity he was entitled to purchase. This was not the fault of the officers of the United States, as it was in the power of the plaintiff to have had his front tract surveyed to ascertain the quantity, and to have availed himself of the privilege accorded by law. Not having done so, within the time specified by the acts of Congress of 1811 and 1820, we think that his right of pre-emption under those acts, ceased and became void. It would seem that such were the plaintiff's views also, as it does not appear that he made any effort to purchase the deficient quantity, for more than fourteen years after the date of his first purchase. This is such a long acquiescence in a reputed error, as to require a very strong case to be made out, to induce us to interfere, and evict an innocent purchaser.

As to the rights of the plaintiff under the act of 1832, we think they are untenable. Having once availed himself of the privilege granted by the acts of 1811 and 1820, he had no further rights granted to him by subsequent laws. The act of Congress of June 15th, 1832, we do not regard as a revival of any previous act or acts. It is an independent provision, made in favor of those who had not had the benefit of previous laws, and includes an entire new class of cases, not previously provided for. But, if we suppose that it did not, the cause of the plaintiff would not be advanced by it. The act of 1832 contains the same restriction as previous laws, as to the right of preference being upon vacant lands only, and it also provides that the time of delivering the notice of intention to purchase, shall be considered as the date of the purchase and acceptance of the right. It is shown, beyond all doubt, that at the time that the plaintiff made his purchase, the land was not vacant, but had for several years previous been in the possession of the defendant, who had cleared a large portion of it, had erected houses and improvements on it, and had cultivated portions of it in and after the year 1832, all of which facts were known to the plaintiff, and not disclosed by his agent to the public officers when he applied to purchase the land. It is not denied that the defendant was a settler on the place, and entitled to a right of preemption under the act of June 19th, 1834, if this claim had not been interposed. This case approaches so nearly in its main features to that of *Marsh and Miller* v. *Gonsoulin*,, 16 La., 84, that we must come to the same conclusion in relation to it. The plaintiff's counsel contends that the act of the Register and Receiver in selling the land to the plaintiff, has divested the United States of all title, and that it could not afterwards be sold to the defendant. We are bound to presume that the officers of the United States would not have sold the land, had they known it was occupied; and the argument is not to be received with much favor, when it appears that neither the plaintiff, nor his agent, disclosed the fact of the land being occupied at the time of or previous to the sale. If the land had in reality been vacant, some doubt might exist whether some proceeding was not necessary, on the part of the United States to annul the sale; but as it is certain that the land was not vacant, the officers had no right to sell it, and we have therefore a right to

examine into the validity of the sale, according to the principles laid down in the case of *Wilcox* v. *Jackson*, 13 Peters, 498, and in repeated decisions of this court.

Being satisfied that the Register and Receiver sold land which they had no legal authority to sell, we cannot do otherwise than declare the sale to the plaintiff a nullity.

The defendant having shown that he has purchased the same land under the pre.emption law, we are of opinion that there is no error in the verdict and judgment of the inferior court.

Judgment affirmed.

HENRY C. THIBODEAUX *v.* ALEXANDER THOMASSON, and others.

APPEAL from a judgment of the District Court of Lafourche Interior, *Nicholls*, J.

Miles Taylor, for the plaintiff.

Ilsley, for the appellant.

MARTIN, J. One of the defendants, St. Clair Thomasson, is appellant from a judgment by which the sale of certain property, which he claims, has been declared to be simulated, null, and void, as to the plaintiff, and a half lot and certain slaves therein mentioned, have been ordered to be seized and sold to satisfy a judgment obtained against Alexander Thomasson by the plaintiff. The facts of this case are recorded at full length in a judgment delivered in March, 1841, between the plaintiff and certain co-defendants of the appellant See 17 La. 353.

His counsel has urged: *First*, That the sale of the half lot by Alexander Thomasson to his sisters, was made long before the origin of the plaintiff's claim against him; that it was by an authentic act, and that the delivery took place *brevi manu*, the vendees dwelling on the premises.

Second, That the vendor was not suffered to remain in corporal

possession of the premises, nor to occupy them under a precarious title.

Third, That anterior creditors might attack the sale, but that posterior ones must bring themselves clearly within the articles of the Civil Code.

The case was tried by a jury, who brought in a verdict against the present appellant, who made no attempt to obtain a new trial. On a close examination of the evidence, we are unable to discover any thing which authorizes us to disturb the verdict. The sisters of the vendor, his vendees, were on a visit to him on the premises, when the act of sale was executed. They do not appear to have remained long with him afterwards, nor ever to have interfered with the premises. Their vendee, the present appellant, does not appear ever to have taken possession. There is, however, some evidence of his having sought to lease or sell the premises; but to this part of the testimony, the jury does not appear to have given any credit. A. Thomasson, the original owner, does not appear ever to have quitted the possession of the premises, or to have ceased to exercise complete ownership over them. The slave was contracted for and paid for by A. Thomasson; although the bill of sale for her was taken in the name of his sister. The slave was in his possession sometime before the sale, and he does not appear to have ceased to possess her. Neither his sister, nor the present appellant, her vendee, have ever interfered with the slave or her issue. The questions of law, which the present appellant has urged, were considered and disposed of, when this case was before us between the plaintiff and some of the co-defendants of the appellant.

Judgment affirmed.

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MARTHA HART and others, Heirs, v. ARTHUR M. FOLEY.

The plaintiff in a petitory action, must show a good and legal title in himself.

A defendant, sought to be evicted by a petitory action, may urge, by way of exception to the title of plaintiff, any thing that he could plead in a direct action of nullity.

Though the interest of the wife, or of her representatives, in the property of the community, attaches at the dissolution of the marriage, subject to their right of renouncing and of being exonerated from the payment of the community debts, they can claim nothing of the *acquêts et gains* until the debts of the community are paid.

An adjudication to the surviving partner, of the whole of the community property encumbered with its debts, is void; no such adjudication can be made before a liquidation of the community, showing the real amount of the *acquêts et gains*, and of the property owned in common.

The community is dissolved by the death of one of the spouses; and the survivor and the heirs of the deceased, are each seized of one undivided moiety of the property, subject to the payment of the debts.

A creditor who wishes to hold the heirs of the wife responsible for a community debt, must join them in his suit against the husband, for the latter no longer represents the community.

Prescription cannot avail one not in possession.

Defendant being in possession, no prescription can bar his right to contest the validity of the title under which the plaintiff claims.

Where property brings less than the amount of the mortgage of the creditor at whose suit it is sold, all subsequent mortgages fall to the ground, and the sheriff is authorized to erase them.

THE plaintiffs are appellants from a judgment of the District Court of Assumption, *Deblieux*, J., in favor of the defendant, quieting him in the possession of the land in dispute.

Beatty, for the appellants.

Miles Taylor, for the defendant.

MORPHY, J. The petitioners seek to recover a tract of land, adjudicated to their father, Robert Thompson, at a sheriff's sale, made at his own suit, as a judgment creditor of one André Candolle. The material facts of the case, as disclosed by the record, are, that on the 1st of August, 1822, Antoine Barras and André Candolle made their promissory note for $2130, by which they bound themselves jointly and severally to pay said sum in all the month of March, 1823, to the order of one Louis Riché, by whom it was endorsed over to Thompson, before the maturity of this obligation, on the 21st of October, 1822. The community which had

existed between Candolle and Anne Le Gros, his wife, was dissolved by the death of the latter, on the 12th of October, 1823. All the community property, consisting of several tracts of land, besides the one in dispute, thirty eight slaves, a considerable quantity of moveables, and credits to a large amount, was adjudicated to Candolle, at the appraised value or price of the inventory, to wit, the sum of $59,808. Barras and Candolle having failed to pay their note, Thompson obtained a judgment *in solido* against them on the 26th of November, 1823. Under this judgment, a *fieri facias* was issued, and levied on the tract now claimed, which had become the exclusive property of Candolle, under the adjudication previously made to him by a decree of the Court of Probates of the parish of Assumption. The property was sold, at twelve month's credit, to one Joseph Menard, who having failed to pay his bond, the land was again offered for sale, and finally adjudicated to the seizing creditor, Thompson, for $55, on the 17th of April, 1826. Notwithstanding this sale, and the one previously made to Menard, it appears that Candolle was suffered to remain in the quiet and undisturbed possession of the property up to the year 1829, when under a judgment obtained against him by his children for $26,153 75, as their share of the *acquêts et gains*, the property was seized and sold to Joesph Menard, who remained also in the peaceable possession of the premises until the death of his wife. At the succession sale of the estate of Menard's wife, the land was publicly adjudicated to the present defendant for $7000, on the 22d of February, 1836, and this action was instituted on the 20th of September, 1837.

Under this state of facts, it is contended on the part of the defendant and appellee, that under article 684 of the Code of Practice, and the settled jurisprudence of this court, no adjudication could be, or was in fact made to Thompson on the 17th of April, 1826, because no bid was offered to the amount of the special mortgage in favor of the heirs of Anne Le Gros, existing on the land by virtue of the adjudication made to Candolle of the community property, and under the judgment reducing such mortgage to $26,153 75. Civ. Code, art. 338. 3 Martin, N. S., 604. 4 Ib., 162.

On the part of the appellant, it is urged:

1. That admitting the plaintiffs' title to be illegal and defective,

the defendant cannot avail himself of that nullity in this action, but must bring a direct action of nullity to have it avoided.

2. That the pretended special mortgage which is said to have existed and to have prevented the sale, was a mortgage of less dignity than the lien of the plaintiff in execution, his claim being one against the community which had existed between Candolle and his deceased wife, while this mortgage was for a claim of the heirs of the wife for her half of the community property, which could only have effect, after the debts of the community were paid out of the property, that being the common pledge of all the creditors of the community.

3. That prescription has cured the nullities or defects of the title of the petitioners, if any ever existed.

4. That if the sale to Thompson be set aside as null, his judicial mortgage which has since lain in abeyance should be declared to be reinstated, and the property sold to satisfy the same.

I. The rule is that in a petitory action the plaintiff is bound to show title in himself; this, we apprehend, means that he must show a good and legal one. If that which he exhibits is defective, and contains absolute nullities, apparent on the face of it, the defendant in possession can surely avail himself of such nullities. So long as he is left undisturbed, he has no interest in bringing an action to annul a title which may never be set up or opposed to him, but whenever, under such adverse title, he is sought to be evicted, he can urge against it, by way of exception, any thing that he could plead in a direct action of nullity.

II. Were this a controversy between the heirs of Candolle's wife, and the petitioners, as creditors of the community, to render the community property subject to their claim before its partition or adjudication, under art. 338 of the Civil Code, it would wear a very different aspect from that which it presents when a third party is concerned. In *Lawson et ux.* v. *Ripley*, 17 La. 238, we have said, that the wife, or her representatives, although their distinct interest in the community attaches at the dissolution of the marriage, subject to their right to renounce and be exonerated from the payment of the community debts, have nothing to claim out of the *acquêts et gains*, until such debts are paid. It seems to us extremely improbable that the code ever contemplated that the

whole amount of the community property, however incumbered with debts, could be adjudicated to the surviving father or mother; and the difficulty which now engages our attention, shows the impropriety of such an adjudication, before a liquidation of the community is made, showing what are the *acquêts et gains*, and the property really owned in common between the children and the surviving father or mother. As our laws, however, have provided no mode to compel a regular settlement of a community dissolved by the death of the wife, it behooves the creditors of the community to interfere for the protection of their own rights. After the death of one of the spouses, the community, in a legal sense of the word, is terminated; each party is seized of one undivided half of the property, subject to the payment of the debts. The creditor who wishes to hold the heirs of the wife responsible for a community debt, must join them in his suit against the husband, for the latter no longer represents the community which is at an end. In the present case, Thompson sued Candolle alone; the judgment he obtained could not be opposed to the children, or affect their special mortgage previously recorded; as to them it was a debt personal to their father. Had he sued the children and obtained a judgment against them, as for a debt of the community, he might perhaps have successfully attacked the adjudication, or at least he might have seized their mortgage claim in the hands of Candolle. But Thompson having looked to Candolle alone, and his heirs claiming now under the latter as the sole owner of the property which they say was transferred to them by the sheriff's sale, they cannot be allowed, in the present suit, to question the validity of the proceedings in the Court of Probates, under which Candolle acquired his minor childrens' share in the property in dispute. One of the principal and legal consequences of this adjudication, was to create a special mortgage on the property in favor of his children. This mortgage existed before the rendition of the judgment obtained by Thompson against their father individually. The defendant, who was a third party, was not bound to know the origin of the debt for which Thompson obtained a judgment against Candolle, more than one year after the death of his wife. Finding this judgment recorded after the mortgage of the children, the defendant must have considered the sheriff's sale to Thompson

as a mere nullity, and in this opinion he must have been confirmed by the course pursued by Thompson himself, notwithstanding the adjudication made to him of this property. He suffered Candolle to remain in possession of it, and afterwards saw the property advertised twice for sale, and pass successively into the hands of Joseph Menard and the defendant, without raising any claim to the property. Under such circumstances it appears to us that the petitioners should not be allowed to disturb the defendant, who is a purchaser in good faith.

III. As to the plea of prescription against the nullities which may exist in the title on which the plaintiffs claim. Admitting that the nullity which is shown to exist in this title could be cured by prescription, of which we entertain strong doubts, it appears to us that it cannot avail a party not in possession. The defendant on the contrary, being the possessor, no prescription can bar his right to contest the validity of the sheriff's sale, under which the plaintiffs claim.

IV. We cannot decree the reinstatement of Thompson's judicial mortgage on the property in dispute, on the very ground which induced us to consider his title as a nullity, to wit, the existence of the special mortgage of $26,153. When the property was sold at the suit of Candolle's children, and bought by Menard for a sum less than the amount of their mortgage, all subsequent mortgages fell to the ground, and the sheriff was authorized to release them. Code Prac. 708.

Judgment affirmed.

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HÉLÈNE JEAUDRON and Husband v. ZEPHYR BOUDRAUX, Tutor, &c.

A widow has a right to recover her paraphernal estate, independently of any settlement of the community. She cannot be charged with her share of particular debts due by the community, but only with the final balance, on a settlement of the estate, in case she has, either tacitly or expressly, accepted the community.

One partner cannot sue another for particular sums paid on account of the concern; the action must be for a final settlement of the partnership, and for the balance due after such liquidation.

APPEAL from the Court of Probates of Lafourche Interior, *Knoblock*, J.

BULLARD, J. The plaintiff, Héléne Jeaudron, sues in this case to recover from the tutor of her children, who are the heirs at law of her former husband, an amount inherited by her during marriage, alleged to be $824 41. The defendant pleads various small sums in compensation, which he alleges were paid to the plaintiff, Héléne, on account of her paraphernal estate. Judgment was rendered for her, allowing her only a small part of her demand, and she appealed.

We think that the plaintiff, Héléne, was chargeable in this action, with only such sums as were received by her on account of her separate claim, and not with any share of the debts of the community paid by the curator. The widow has a right to recover her paraphernal estate, independently of any settlement of the community, as we held in the case of *Robin et als.* v. *Castille*, 7 La. 292. The representative of the estate has no right to charge her with her share of particular debts due by the community, but only with a final balance, on settlement, if she has accepted the community either tacitly or expressly. Such a proceeding would in substance charge her with a part of the debts, without rendering an account to her of her share of the common property. The case is analogous to that of one partner suing another for particular sums paid on account of the concern, which we have often held could not be done, but that there should be a final settlement of all the partnership accounts, and an action only for the balance due on such liquidation.

The just credits against the plaintiffs' demand, according to these principles, appear to amount to $436 19; the other items either being without proof, or liable to the objections above stated. The rights of the estate on account of the payment of debts, is reserved for a final settlement of the community.

The plaintiffs' counsel contends that she is entitled to interest from the opening of the succession, under article 989 of the Code of Practice. We are of opinion that this is a debt due by the estate upon which interest may be claimed, but as partial payments were made, interest must be calculated from the last payment, to wit, March 29, 1838.

The judgment of the Court of Probates is therefore reversed, and ours is for the plaintiffs for the sum of three hundred and eighty eight dollars and twenty two cents, with interest at five per cent from the 29th of March, 1838, and costs in both courts.

Miles Taylor, for the appellant. No counsel appeared for the defendant.

EDWIN B. SMITH and another *v.* BENJAMIN POYDRAS DE LALANDE and another.

Where the creditors of an insolvent, having voted for two persons as joint syndics, remain silent while one of the two procures himself to be recognized by the court as sole syndic, sells the property of the estate, completes his administration, and files his accounts, and a final tableau of distribution, which is homologated without opposition, they will be considered as having ratified his acts, and will be bound by their silence.

An insolvent, who has surrendered his property to his creditors, is interested that the estate should be legally disposed of, in order, in case of its insufficiency to pay his debts in full, to diminish as much as possible the balance that may remain due, or, in case of its sufficiency, to preserve for himself whatever may be left after the creditors have been satisfied; but this interest is not a *real* one, in any part of the property ceded.

A debtor who has surrendered his property to his creditors, cannot, after the proceedings in insolvency have been closed, interfere and set aside a sale, by the syndic, of property in the hands of an innocent purchaser.

APPEAL from the District Court of Pointe Coupée, *Deblieux*, J.

Ilsley, for the appellants.

Janin, for the appellees. 1. The interest which an insolvent has in property surrendered to his creditors, is not a *real* right, which follows the property into the hands of a purchaser. The purchaser in good faith is safe, even in case of fraud on the part of the creditors or of the syndic. 1 Bullard and Curry's Digest, 495. 2. The sale to the plaintiffs was under an order of court, and the purchaser is protected. *Michel's Heirs* v. *Michel's Curator et al.*, 11 La., 149. *Lalanne's Heirs* v. *Moreau*, 13 La., 431. *Ball's Administratrix* v. *Ball et al.*, 15 La., 182.

MARTIN, J. The plaintiffs are appellants from a judgment dissolving an injunction, which they had obtained to stay proceedings on an order of seizure and sale, issued against them, for the price of a tract of land, ceded by Arnaud Beauvais to his creditors, on the ground that the sale was effected by one syndic, while the creditors had voted for two individuals as joint syndics, in consequence whereof the plaintiffs are in danger of eviction.

The record shows that the individual who effected the sale, presented his petition to which was annexed the *process verbal* of the meeting of the creditors, praying to be recognized as sole syndic, and to be allowed to give security accordingly, which was ordered by the court; and that one month afterwards, no application having been made by the other individual named as syndic, and no opposition to the proceedings having been filed by any of the creditors, the applicant gave bond and security. That after having disposed of the property surrendered, under various orders of the court, he brought his administration to a close, and presented his account and tableau of distribution, the filing of which was duly advertised, and finally homologated without opposition.

It is clear that the individual named as a joint syndic with the applicant, or any of the creditors, might have interfered and prevented the former from acting as sole syndic, or otherwise intermeddling in the administration of the estate without sufficient authority. But they all remained silent and saw him recognized by the court as sole syndic, sell the property as such, complete his administration, and file his accounts, and final tableau of distribution, praying for its homologation, and for authority to make pay-

ments accordingly. The parties interested, though notified by legal advertisements, to make any objection which they might have to these documents, or to oppose his discharge, remained silent, and suffered the usual orders to be made.

The District Court was of opinion that the acts of A, transacting the business of B without authority, may, by the express or implied ratification of the latter, be rendered as binding as his own acts. There can be no good reason why this principle should not be extended to one acting as syndic, without due authority, when his acts receive the ratification of the creditors of the insolvent, in such a manner as the creditors of Beauvais have manifested their approbation of the proceedings of the person, who acted for them in the disposal of the estate surrendered.

It does not appear to us that the court erred. The creditors must be bound by their silence.

The appellants have further contended that they are liable to the action of the insolvent, who has an interest in the residue of his estate, after the creditors have been paid. The cases in which a residue remains in the hands of the syndics to be paid to the insolvent, are extremely rare; for the insolvent is he who has not wherewith to pay his creditors. He has, however, a contingent interest; and, as to it, the syndic represents him. Indeed, even when there is no residue, he has an interest that the estate surrendered should be legally disposed of, in order to lessen as much as possible the balance remaining due to his creditors after the distribution of the proceeds of the estate surrendered. This interest is not a *real* one, on any part of the property ceded. In the case of *Arcenaux* v. *His Creditors*, 6 La., 9, we held that the 'insolvent has certainly a claim for any part of his estate, or of the produce thereof, in the hands of the syndics, or which ought to be there, after his creditors are satisfied; and *this is all he may claim, in regard to the surrendered estate.*'

In that case, however, *arguendo*, we said, 'if the sale has been illegally conducted, it can only be set aside, and the property recovered by a proper suit against proper parties; and we are not aware that the homologation of the tableau could preclude the insolvent, or affect any right to which this irregularity might give rise, or any claim he might have against the syndics after the credi-

tors were all paid, if he could show that from their neglect in giving proper credits, or from illegal charges, they have destroyed or administered what he might be entitled to after his creditors are fully paid.'

The District judge was of opinion that there is nothing to prevent the insolvent from interfering, to prevent the illegal administration or waste of the estate ceded; but that this interference must be made while the proceedings are still going on, *id est*, before they are finally closed.

It is useless to enquire whether such interference by the insolvent, may be allowed at any time; as in the present case, it was not made before the close of the proceedings. In the case of *Arcenaux* v. *His Creditors*, we expressed a doubt whether a syndic's sale, could, after the close of the proceedings, be set aside, in the hands of an innocent purchaser. We have said that the insolvent's rights, after the distribution of his estate, are only upon what remains, or ought to remain in the hands of the syndic; and that he has no *real* right on the estate surrendered. This leads us to the conclusion, that the plaintiff is under no apprehension of an eviction by the insolvent.

The judgment must, however, be amended according to the prayer of the appellees, by giving damages against the surety on the injunction bond, as well as against the principal, *in solido*.

It is therefore ordered, that the judgment of the District Court be affirmed with costs, and that the appellee further recover against Augustin Bourgeat, the surety, *in solido* with his codefendant, the interest and damages given against the principal by the judgment below.

The State v. Pierre Boisseau and others.

No proof will be required of the signatures to a bail bond, taken and attested officially by a justice of the peace.

When a bond has been executed by filling up a printed form, interlineations made in consequence of want of space to contain all the necessary writing, will be considered as sufficiently accounted for.

Appeal from the District Court of East Baton Rouge, *Jones*, J. This case was submitted to the court by the Attorney General, without argument.

Garland, J. Francis Nephler is appellant from a judgment rendered against him, as bail for the appearance of Pierre Boisseau before the District Court of the parish of East Baton Rouge. The principal did not appear when finally called on, and a forfeiture *nisi* was taken against him and his bail. On the trial, the District Attorney offered in evidence the bond executed by Boisseau as principal, and Nephler and Charles Vincent as his securities. The counsel for the defendants objected to the bond being received in evidence, because the signature was not proved, and because the name of 'Boisseau, and the words five hundred dollars for each security, were interlined.' The District judge overruled the objections, on the grounds, that the bond was taken and attested officially by a justice of the peace of the parish, and that the interlineations were sufficiently accounted for, from the circumstances of the bond being a printed form, in which not sufficient space was left to contain all the writing that was necessary to state the sums, the interlineations being in the same hand writing and with the same ink. The defendants excepted to this opinion, and there being a judgment against Boisseau for $1000, and against Vincent and Nephler for $500 each, the latter appealed.

The only point in the case is upon the bill of exceptions, and we are of opinion the judge did not err. The bond was an official act, taken by and in presence of a competent authority, and it was the duty of the Court to notice it. The original bond has come up with the record, and it is plain that the interlineations were made as stated in the bill of exceptions. There is no special denial of the signatures, nor is it pretended that any change was made in the obligation, after it was signed, or any fraud or deception practised.

Judgment affirmed.

The Police Jury of St. Helena v. David J. Fluker, Administrator.

The demand required to be made of an administrator, curator, or testamentary executor, before commencing suit against a succession, is in the nature of an amicable demand, and need not be proved, unless specially denied.

Police Juries are civil corporations, and may sue and be sued.

Where the demand in the petition exceeds five hundred dollars, but the amount in dispute has been reduced below that sum by pleas of prescription and *res judicata*, the testimony of a single witness, without corroborating circumstances, will suffice to establish the plaintiffs' claim for such reduced amount.

Appeal from the Court of Probates of East Feliciana, *Saunders*, J.

Mure, for the plaintiffs.

Lyons, for the appellant.

Garland, J. The petition alleges, that Kenion T. Kendrick, during the years 1823, 1824, 1825, and 1826, acted as the sheriff of the parish of St. Helena, and assumed upon himself the duties of collector of the parish taxes during those years; that he received the taxes, and accounted for a portion of them, leaving a balance still due of $765 13, which sum is now claimed of his administrator. It is alleged that the claim has been presented to Fluker, who refuses to pay it, or to recognise it as a debt due by the succession.

The defendant filed an exception to the capacity of the plaintiffs to sue, because the action is not brought by the proper individuals, and the names of the plaintiffs are not set out, and on the ground, that the Police Jury could not institute this suit. He then proceeds, in the event of his exception being overruled, to answer to the merits by a general denial.

At a subsequent term of the Court, the defendant amended his answer, and filed a plea of *res judicata*, setting forth two suits which had been brought by William George, Treasurer of the parish of St. Helena, against Kendrick, in his life time, for the use and benefit of the Police Jury, in which the same matters were in contestation, and in which judgments were rendered in favor of the defendant. He also pleaded the prescription of one year. He further said, that in the years for which the balances are claimed, no legal assessments were made, and the payment of the taxes

could not be enforced in the parish of St. Helena; and that Kendrick had paid all the moneys he ever collected. He further says, if Kendrick is liable at all, it is on the official bonds which he gave, faithfully to collect the parish and state taxes. He subsequently filed a plea of prescription of ten years.

On the trial, it was proved by Thomas Webb, that he had acted as the deputy of Kendrick during the whole time that the latter was sheriff, which was in the years 1823, 1824, 1825, and 1826, during all which time Kendrick was collector of the parish taxes. The witness was present, when various payments were made by Kendrick, which are stated in the account filed with the petition. He also proves that the four tax rolls offered in evidence, were the tax rolls of the parish for the aforesaid years, and that they are the same that were placed in the hands of Kendrick as tax collector. He says that he has no interest in this suit.

The Probate Court decided, that for the taxes of 1823 and 1824, the claim was prescribed by the lapse of ten years. For those of the year 1825, the plea of *res judicata* was maintained, and a judgment for $444 52½, with legal interest, was given in favor of the plaintiffs, being the balance due of the taxes of 1826, from which judgment the defendant has appealed.

We are met at the threshold by various bills of exception. The first of which is to admitting Thomas Webb as a witness, to prove the account annexed to the petition. The defendant objects on the ground, that the law directs sheriffs to give bonds for the faithful discharge of their duties, and that it having been proved that Kendrick acted as collector of taxes for several years, it must be presumed, that he gave such bonds, and that he can only be sued on them. It was further objected, that as the parish treasurer kept a record of moneys received for the use of the parish, his account would be the best evidence of the sums paid by Kendrick, and of his deficit. These objections were overruled, and an exception taken. The first ground seems to us rather an exception to the action, than a valid objection to the witness; it is at any rate a legal conclusion arising out of the pleadings, and does not show the incompetency or interest of the witness, and seems to take for granted an issue the Probate judge had to decide, and which was finally adjudged against the defendant. The other ground does not seem

to be more tenable. It is not shown that any record was kept, even if the law required the treasurer to keep one; and it is the first time we have ever seen a defendant object, that evidence offered was not of the best kind, when the tendency of it was to lessen his own liability. We think the judge did not err.

During the trial, the plaintiff offered in evidence the documents purporting to be the assessment rolls of the parish for the four years before mentioned. To the reading of them the defendant objected, on the ground that they were not proved, or authenticated. Thomas Webb was then offered to prove that they were the tax rolls, and the same which were placed in the hands of Kendrick as sheriff or tax collector by the witness, whose testimony was objected to, on the ground that it was not the best evidence of which the case was susceptible. The objection was overruled, and the defendant excepted. The defendant has not in his bill stated, what other better evidence existed, by which the facts could be proved, and as we are not aware of its existence, we cannot say the judge erred. As to the assessment roll for the year 1826, for the taxes of which year only a judgment is given, it is duly certified by the assessors and parish judge in conformity to law; and as to the others, it is a matter of no moment, as the case stands.

Many objections to other portions of the testimony were urged, but they do not appear to have been raised in the Court below, and we cannot notice them. All the objections appearing on the record, have been stated.

The first objection urged in this Court, is that the action must be dismissed, as there is no evidence of the demand having been presented to the administrator, previous to the institution of the suit. In reply to this, the plaintiffs say that the presentment and demand are alleged, and as they were not specially denied, that they were not bound to prove them. This appears to us correct. The demand is in its character an amicable one, and stands upon the same principles as other amicable demands; and we have often said, no proof of an amicable demand is necessary, unless specially denied.

We do not think that the judge erred in overruling the exception, as to the capacity of the Police Jury to institute this suit. Bodies of this description are civil corporations, created for purposes of local police, and have always been considered as qualified to

stand in judgment. 7 Martin, 17. The reports are full of cases, in which those bodies have been plaintiffs and defendants.

We are also of opinion that the court did not err in sustaining the plea of *res judicata*, in relation to the taxes of 1825. In the suit instituted by George, the parish treasurer, it is specially alleged that he was authorized by the Police Jury to sue, and that he does so for their use and benefit. His authority was denied, but sustained by the court; and on the merits, the defendant had a verdict and judgment. The parties were essentially the same, the object of the suit was to recover the taxes of 1825, and though the evidence offered to sustain that action was different, the suit was not of so distinct a character as to induce us to go again into an investigation of the question. The enquiry would be a very useless one, as the plea of prescription would probably apply, if that of *res judicata* should prove ineffectual.

As to whether there were any legal assessments in the years 1823, 1824, and 1825, it is unnecessary to enquire, as the action for the two first years is clearly prescribed, and that for the taxes of the last it is already settled. The tax roll of 1826 appears to us to be in due form, and if no means existed of compelling the payment of taxes, Kendrick ought to have looked to it before he undertook the collection. He was not bound to collect the parish taxes, and when he assumed the duty, it is to be presumed he understood what difficulties existed.

We are clearly of opinion that the prescription of one year does not apply in this case, but that the prescription of ten years does, and must prevent any recovery of the balance of taxes for 1823 and 1824.

The defendant has urged most earnestly, that the demand in this case exceeded $500, and that there is only one witness, Webb, to sustain it, without any corroborating circumstances. In the first place, the defendant, by his pleas of prescriptson and *res judicata*, has prevented us from examining a portion of the demand set up, and has thereby reduced the sum in controversy below $500. But even if that were not the case, we think there are corroborating circumstances in the record to sustain the testimony of Webb. The tax roll of 1826, which is good evidence without Webb's statements in relation to it, is one circumstance, and the admission found in the record of

the suit against Kendrick, that he acted as sheriff, is another circumstance; and others could be named, not depending on Webb's testimony.

The defendant insists that the judgment must be annulled, as it allows interest at five per cent per annum from its date. We do not think so. Kendrick was the agent of the plaintiffs to collect taxes for them, and to account. He was a public officer and a defaulter, and we think is bound to pay interest. Civ. Code, art. 2259. The claim for interest, can also be sustained under article 969 of the Code of Practice.

Judgment affirmed.

SAMUEL C. BELL and another, for the use of Charles McMicken, v. JAMES H. MIX, Administrator.

APPEAL from the Court of Probates of West Feliciana, *Dawson*, J.

BULLARD, J. This is an action against the succession of the maker of a promissory note, bearing date the 1st of February, 1829, and the suit was instituted in 1839.

The administrator pleaded a failure of consideration, and the prescription of five years. The plea of prescription was sustained, and the plaintiffs appealed.

It is contended in this court, as it was without success in the court below, that the prescription was interrupted by a suit brought upon the same note before the five years had elapsed. It is shown that in 1831 suit was brought; that the defendant prosecuted an appeal to this court, and that the judgment was reversed; and that after a second appeal, the case terminated by a nonsuit. See 3 La. 447. 10 Ib., 514.

This is clearly an interruption of the prescription. The parties were substantially the same, the only difference being, that, in the

present case, the action was brought by Bell and another for the use of McMicken. The plaintiffs had a right to give what destination they thought proper to the fund when collected, and the defendant has not pleaded that the note belonged exclusively to McMicken. No objection is made to the form of the present action, and the defendant cannot complain that the form of the action enabled him to avail himself of any defence, either against the Bells or McMicken. 17 La., 213. Civ. Code, 3484.

The evidence does not satisfy us that the consideration for which the note was given has failed; and its due execution is admitted. The plaintiffs are therefore entitled, in our opinion, to have their claim against the estate of Williams acknowledged, as one to be paid concurrently with the other creditors in the due course of administration. Code of Practice, arts. 986, 987.

It is therefore ordered that the judgment of the Court of Probates be reversed, and the plea of prescription overruled; and it is further adjudged, that the plaintiffs recover of the estate of Williams fifteen hundred dollars, with interest at ten per cent from the 1st of February, 1830, until paid, subject to a credit of one hundred and eighteen dollars and twenty seven cents on the 15th March, 1832, to be paid concurrently with the other creditors in due course of administration, together with costs in both courts.

J. R. Thomas, and *J. P. Bullard*, for the appellants.

Boyle, for the defendant.

JAMES M. REYNOLDS and another *v.* THE FELICIANA STEAMBOAT COMPANY.

APPEAL from the District Court of West Feliciana, *Dawson*, J., presiding.

This case was submitted to the court, on the points filed by *T. J. Cooley*, and *Janin*, for Zenon Porche and Augustin Le Blanc, the appellants, and by *Turner*, for the plaintiffs.

BULLARD, J. This case is the same with that reported in the 17th volume of the Louisiana Reports, p. 397, except that other defendants are appellants. They rely on the same assignments of errors, and the same judgment must be given, for the reasons stated in the opinion of the court referred to.

It is therefore ordered that the judgment of the District Court be reversed, and that the case be remanded for further proceedings according to law, the plaintiffs and appellees paying the costs of this appeal.

DOMINIQUE FRANÇOIS BURTHE, and another, v. E. LEON BERNARD.

A bond taken in the name of the sheriff, on a sale, under execution, at twelve months' credit, is for the benefit of the judgment creditors; hence the law requires, if there be several such creditors, that as many bonds be taken as may be necessary to deliver to each party his just portion of the price. These bonds should be made out in the names of the different parties, among whom the price is to be divided.

Where a single bond was taken, in the name of the sheriff, on a sale, under execution, at twelve months' credit, for the whole price of the property, which was sold free from all incumbrances, it represents the whole price, and belongs to the several parties interested, according to their rights in the property itself.

A bond taken in the sheriff's name, on a sale, under execution, at twelve months' credit, is in his hands only as a deposit. He has no property in it, which he can transfer to any other person than the party for whose benefit it was taken. Where such a bond has been assigned to a third person, the parties entitled to it will have the same remedies against the assignee, as against the sheriff, had he retained it and received the amount.

The Recorder of Mortgages, having erased plaintiff's mortgage, without his consent; and the sheriff having sold the land, seized at the suit of the plaintiff, at twelve months' credit, and assigned to a third person the bond taken for the price, *held:* that plaintiff may look to the Recorder of Mortgages for indemnity, or to the proceeds of the sale in the hands of such third person, at his pleasure.

APPEAL from the District Court of the First District, *Buchanan*, J.

This case was submitted on the points filed, by *Soulé*, for the appellant, and *V. Burthe*, for the appellees.

MORPHY, J. Under an execution issued from the City Court of New Orleans, by virtue of a judgment against Copland and

McLawrie, the city marshal, B. Beauregard, levied upon and exposed for sale two lots of ground, on which the petitioners had a special mortgage as vendors, for the sum of $1484 64, with interest from the 29th of March, 1837. The lots not reaching to two thirds of their appraisement, were again offered for sale on a credit of twelve months, and were adjudicated to one F. A. Conant for $3600. The purchaser executed his bond payable to the marshal for the full amount of the adjudication, on the latter raising all the mortgages existing on the property. The marshal endorsed this bond, making it payable to bearer, and had it negotiated to the defendant, through W. L. Palmer, a broker. Neither the mortgage, nor the suing creditors were paid out of the proceeds of the sale. Under these facts, the petitioners aver, that by reason of their mortgage, they were the first to be paid out of the price obtained for the property seized; that the transfer to the defendant was illegal and void, the marshal having no right whatever to said bond, which was in his hands only as a deposit; and that the defendant cannot be considered as a *bona fide* holder of the bond, it being apparent, from the face of the instrument itself, that the marshal had no right or title to it. They pray that the defendant may be decreed to deliver up to them the bond, and in default thereof to pay the full amount of their debt, with interest and costs. The answer denies this right of the plaintiffs to sue on the bond, they not being parties to the suit, in which the order of seizure was issued. It avers insubstance, that the bond was transferable, and that the defendant became the transferree of it *bona fide*, and for a valuable consideration; that he was not bound to know whether all those, who might have an interest in the property sold, were secured; that the mortgages could not have been erased unless with the consent of the interested parties, or on the exhibition of legal proof that they had been duly satisfied; that the maker of the bond, and his endorser, were the only persons that the defendant had to look to for payment, and that they have made no objection; that the rights of the petitioners must either have been annulled, in which case they can no longer claim under them, or those rights are yet in existence, and the property sold must be looked to by them to satisfy the same. This answer, which is somewhat of an argument, concludes with a prayer, that B. Beauregard, the city marshal, and Pierre Landreaux, the

Recorder of Mortgages, be made parties to this suit, and be held liable to the defendant for any loss, which he may sustain in consequence of the transfer made to him of said bond; the first, on account of a violation of duty, and of his having received the amount of the bond; the latter, for having erased the mortgages standing recorded against the property sold to F. A. Conant, upon an illegal order, and in an illegal manner. The marshal made no answer, and the Recorder of Mortgages denied the right of the defendant to make him a party to this suit, averring at the same time, that the mortgages in question had been erased according to law. There was a judgment below in favor of the plaintiffs, and P. Landreaux, from which the defendant appealed.

The bond taken on a sale on twelve months' credit, is for the benefit of the judgment creditor; hence the law requires, if there be several judgment creditors, that as many bonds be taken, as may be necessary to deliver to each party his just portion, after deducting the costs. Although the Code of Practice contains no express direction to that effect, it would seem reasonable to make out these bonds in the names of the several parties in interest, among whom the price of the property is to be divided. A different course however appears to have been followed, and these bonds are generally taken in the name of the sheriff, in his official capacity. The law further directs, that when the property sold is subject to privileges and special mortgages, a bond shall be taken only for the surplus of the price, after deducting such privileges and special mortgages. Code of Practice, arts. 716, 717, and 718. In the present case, the marshal complied with none of these requirements of law. He took a single bond for the whole price of the property, which was sold free from all previous incumbrances. It does not appear, that this was done with the consent of the mortgage creditors, as is sometimes the case when the latter wish to avoid the necessity of an hypothecary action against the property, which by the forced sale is about to pass into the hands of a third person. But whether the adjudication was thus made by consent or not, it is clear that this bond, in the hands of the marshal, represented the whole price of the property sold, and belonged to the several parties having an interest in it, according to their right on the property itself. It was in the hands of that officer only as a deposit; he had no proprietary

right to it, which he could transfer to the defendant; and the several parties entitled to a portion of the price represented by this bond, have, against the latter, the same right which they would have had against the marshal, had he remained in possession of it, and received its amount. Of this the defendant cannot complain, for on the face of the bond itself he saw, that it was not a negotiable instrument; that it could be assigned by the marshal only to the parties in interest, for whose benefit it had been taken. The rule introduced in aid of trade and commerce, by which purchasers and transferrees of negotiable paper may obtain a valid title against the real proprietor from a holder *non domino*, does not apply to a case like the present. The good faith of the defendant cannot protect him, for he acted without sufficient caution, and under circumstances which should have led him to suspect the true state of the case. It is said that the defendant had no better means of ascertaining that all persons interested in the sale of the property, for which the bond was furnished, had been duly satisfied, than by consulting the records of the Recorder of Mortgages, and by seeing that all the mortgages, bearing on the property, had been erased. It appears to us, that the circumstance that the mortgages were cancelled, even those which existed on the property at the time it was seized, and which, under the law, the marshal had no right to erase, should have furnished the defendant with an additional reason for being upon his guard. The tenor of the bond informed him, that the property had been sold for the sum of $3600. He must have known, that all those who had rights on the property, would look to its proceeds: the plaintiffs, whose mortgage had been illegally cancelled; the seizing creditor, whose judgment was unsatisfied; and the owner, for such balance as might be coming to him, after the payment of his debt. But it is insisted, that if the plaintiffs have been injured by the improper erazure of their mortgage, they must look to the Recorder of Mortgages for indemnity, and not to the transferree of the bond received in payment. We are of opinion, that if the plaintiffs' mortgage has been erased without their consent, they are entitled to both remedies. Having looked to the proceeds in the hands of the defendant, the latter cannot defeat their claim by showing the liability of the Recorder of Mortgages to indemnify them, in case they suffer by his act. As to the indemnity,

which the defendant claims of that functionary, we cannot perceive, why he should have it. If he suffers any loss in the premises, it is not in consequence of the erazure of the plaintiffs' mortgage, but because he has incautiously discounted paper, which was not of a negotiable character.

Judgment affirmed.

JAMES ALLEN *v.* PIERRE ARNOUIL.

A salary for personal services, not yet due, cannot be seized under execution.

APPEAL from the City Court of New Orleans, *Cooley*, J.

Redmond, for the appellant. No counsel appeared for the appellees.

BULLARD, J. The plaintiff having recovered judgment against Arnouil, who was in the employment of the Mechanics and Traders' Bank, served a process of garnishment upon the bank, in conformity with the statute of 1839, and put interrogatories touching their indebtedness to the defendant at the time of the seizure. The cashier, in answer to the interrogatories, denied their indebtedness, and upon supplemental questions being propounded, answered that the bank was in the habit of paying the salary of the defendant monthly in advance, and consequently was never in debt to him. The City Court considering the answers as sufficient, notwithstanding the objections of the plaintiff's counsel, discharged the garnishees, and the plaintiff appealed.

The court, in our opinion, did not err. At the time the seizure was made, nothing appears to have been due the defendant on account of his salary; and the bank had a right to pay in advance, inasmuch as the salary for personal services, not yet due, is not liable to seizure on execution. Civ. Code, art. 1987.

Judgment affirmed.

1r 400
49 84
49 974

1r 400
51 598

1r 400
119 731

Succession of Alexander Milne.

The commission allowed to an executor, is for his trouble and care of the estate. Where, besides taking such care and trouble, he is obliged to disburse money in attending to its affairs, he is entitled to be reimbursed out of the estate.

The commission of two and a half per cent on the whole amount of the inventory, subject to a deduction for what is not productive, or due by insolvent debtors; allowed to an executor by art. 1676 of the Civil Code, is for the administration of the whole estate; where a part only has been administered, he is only entitled to a commission on such part. Where the estate has been administered by successive executors, each is entitled to the commission on so much as was administered by him.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Martin, J. The Society for the Relief of Destitute Orphan Boys, is appellant from a judgment overruling its opposition to several items in the account presented by a dative executor, appointed on the removal of the original testamentary executors.

The first item opposed is a sum of $50 50, for rail road tickets, to enable the executor to ride from the city to the lake for one year. The appellants' counsel contends that the law allows the executor an ample compensation for the services required at his hands, and that such items are to be paid for out of his commission. The commission of the executor is expressly allowed for his trouble and care. If besides bestowing his trouble and care on the affairs of the estate, he is obliged to disburse his money, the reimbursement should not be refused, on the ground that he has taken the legal compensation allowed *expressly for his trouble and care.* The sum appears, at first, large. The claim is one of those which, from their nature, cannot be required to be minutely proved by vouchers or witnesses. It supposes sixty seven trips to have been made during the year, and the affairs of the estate do not seem to have demanded such repeated excursions; nevertheless, as in comparison to the value of the estate, the sum is perhaps trifling, we have felt no disposition to disturb the judgment in this respect.

The second opposition is to a charge of two thousand dollars for counsel's fees, which is supported by the testimony of two respectable members of the bar, and we cannot say that it was improperly allowed.

The next opposition is to a charge for office rent. Although one witness has testified to the necessity of the expenditure, we think it was improperly allowed. There is hardly any estate, in the settlement of which a charge might not be made for the room in which the executor receives the persons having claims on the estate, or those on whom the estate has demands, the presses in which he keeps the vouchers, books, etc., of the estate. The testimony shows that the original executors, had provided a chest which they thought was wanted for this purpose.

The last item opposed, is that of $20,908, charged by the dative executor for his commission on the whole amount of the property inventoried. It is true, that the Code of Louisiana, art. 1676, allows to the executor a commission of two and a half per cent on the whole amount of the estimate of the inventory, making a deduction for what is not productive, and for what is due by insolvent debtors. This commission is the compensation which the executor is entitled to, for administering the whole estate; he cannot therefore begin his administration by pocketing it, for if he be prevented, by death or otherwise, from proceeding and completing his administration, it would be absurd to say that he is entitled to the same compensation as if he had completed his work. Nor can it be pretended that on every mutation of the executorship, the preceding and succeeding incumbents are each entitled to a commission on the whole estate. The compensation due to each incumbent, is to be reckoned on the portion of the estate which he administers. The court therefore erred in allowing to the dative executor a full commission on the whole amount of the estate, and the item now under examination ought to be restrained to that portion of the estate which he administered, from his appointment to the rendering of his account. The different sums which he acknowledges to have received, constitute an aggregate amount of $45,340 13. He applied to the payment of a legacy to the town of Fochabers, notes due to the estate amounting to $72,770 84; these two sums make $118,110 97, which is the amount of the estate actually administered by him; for the remainder of the estate, still in his hands, is not yet administered, and no commission is due thereon. That which will accrue hereafter, will be due to the present dative executor, if he completes the administration, and if he does not, to the person

who may do it. The Court of Probates, in our opinion, erred, in overruling entirely the opposition of the appellants, and not reducing the appellee's claim to commissions to $2952 77, being two and a half per cent on $118,110 97.

The view which we have taken of the present controversy, renders it unnecessary to enquire now into the meaning of the legislator, in regard to that portion of an estate, on which no commission is to be allowed, because it is not productive.

It is therefore ordered that the judgment be reversed, and that the items Nos. 13 and 14 in the account of the dative executor, the first of $231 62 for office rent, the second of $20,908 for commissions, be stricken out, and, that for the latter be substituted, one for commission to the dative executor, from his appointment to the rendering of his account, of $2952 77; and that the account thus amended be homologated, and that the dative executor distribute the funds in his hands accordingly. The costs in both courts to be borne by the estate.

G. B. Duncan, for the appellants. No counsel appeared for the appellee.

ROBERT FLUKER, and others, Heirs, *v.* MARGARET KENDRICK, Administratrix, &c.

APPEAL from the Court of Probates of St. Helena, *S. Leonard*, J.

Sheafe, for the appellants.

Baylies, and *Preston*, for the defendant.

MARTIN, J. The plaintiffs, the legal heirs of William Kendrick, are appellants from a judgment rejecting their prayer for the dismissal of the defendant, the widow of the deceased, as tutrix, and curatrix of some of the plaintiffs, and administratrix of the estate of their ancestor, on account of alleged gross neglect, in the discharge of her duties as tutrix, curatrix, and administratrix. She pleaded

the general issue, and the court was of opinion that the plaintiffs had failed to establish their allegations. The case is exclusively one of facts, and presents no legal question for the solution of this court. A close examination of the record and evidence, has led us to the conclusion that the Court of Probates did not err.

Judgment affirmed.

DAVID THOMAS, Administrator, *v.* AUGUSTIN BOURGEAT, Executor. 1 403 / 112 1049

An action against the estate of a deceased administrator, to recover a balance due to the estate which he administered, must be brought in the Probate Court under whose authority the estate of such administrator is being settled, and not in the Court of Probates of the parish in which the first succession was opened; the former court alone being empowered to ascertain and order, contradictorily with the other creditors of the estate of such administrator, the payment of any claims against it. A judgment of the latter court, would not conclude the estate of such administrator, nor his other creditors; nor could any balance it might find to be due by his estate, be paid without an order of the former court. During his life, the administrator was amenable to the latter, and might have been compelled to render an account of his administration; but after his death, any balance, due by him to the estate he administered, became a debt due from his estate, and its payment could only be ordered by the Probate Court in which his succession was opened.

An attorney's fee, for services in making out the accounts, and attending to the defence of a suit against the succession of a deceased administrator, instituted before the court in which such succession was opened, for a balance due to the estate which he administered, cannot be charged to the latter estate. It is only when an account is regularly rendered by the representative of an estate, in the court under whose authority it is administered, that the expense attending it, is chargeable to the estate.

The payment of interest at ten per cent a year, under the act of the 13th of March, 1837, requiring executors, administrators, &c., to render full accounts of their administration at least once in every twelve months, under the penalty of dismissal from office, and of paying interest at that rate, on all sums for which they may be responsible, from the expiration of the twelve months, is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other. The penalty prescribed by this act, can only be inflicted in cases expressly provided for.

APPEAL from the Parish Court of Pointe Coupée, *T. J. Cooley*, J.

Muse, for the appellant.

Stevens, for the defendant.

BULLARD, J. The succession of James Williams being opened in the parish of West Feliciana, James H. Mix was appointed administrator, but died before he had completed his administration, or rendered any account. Whereupon, Thomas, the present plaintiff, was appointed as his successor, and prosecutes this suit against the estate of Mix, represented by Bourgeat, his testamentary executor, to recover the balance due by the testator to the estate of Williams.

The suit was properly brought in the Court of Probates of the parish of Pointe Coupée, although the estate of Williams was administered under the authority of the Probate Court of West Feliciana, which alone had power to order the payment of claims against the estate. Whatever balance was due by the estate of Mix to the estate which he had administered, could only be ascertained and liquidated by the Court of Probates under whose authority the former was administered, contradictorily with the other creditors; and if his executor had settled the account in the Probate Court of West Feliciana, such balance could not have been paid without the order of the court of Pointe Coupée, nor would its liquidation have concluded the estate of Mix, or his other creditors. Courts of Probate have exclusive power to decide on claims for money which are brought against successions administered by curators, executors, or administrators, and to establish the order of privileges and mode of payment. Code of Practice, 924, No. 13.

Undoubtedly, Mix, in his lifetime, was amenable to the jurisdiction of the court of West Feliciana, and might have been compelled by that court to render his account as administrator. But on his death, without having rendered such account, the balance due to Williams' estate, became a debt due by that of Mix, and could only be decided upon, and its payment ordered by the Probate Court of the parish of Pointe Coupée. This manner of proceeding is not free from difficulty, it is true. If Mix paid any debts of the estate of Williams without authorization, and it should turn out that the estate is insolvent, it is clear he paid at his peril. But in the present case there

are no means of ascertaining how far he paid in his own wrong, if at all. If it should turn out that he did so, the creditors to whose prejudice the payments may have been made, have their remedy upon the bond.

The plaintiff in the present case, is appellant from the judgment rendered in the Court of Probates, and complains of certain allowances made to the prejudice of the estate, which we will proceed to notice, after disposing of a motion to dismiss the appeal. The ground of that motion is, that the heirs of Williams, who had been cited on the demand of the defendant, were not made parties to the appeal. But it appears that they excepted to the jurisdiction of the Court of Probates, that their exception was sustained, and that they were no longer parties when the judgment was rendered; nor has the party who called them in thought proper to appeal, or to make them parties. They are therefore without interest, and the motion to dismiss is overruled.

The first objection, is to item No. 4, on the ground that it is not a privileged claim, and that the estate is insolvent. According to the views above expressed, the Probate Court of Pointe Coupée could not decide, whether that claim was privileged, or how much of it the late administrator was authorized to pay, as it relates to other creditors. All just claims paid by him ought to be allowed, subject to the condition of refunding, if it should afterwards appear that any part was wrongfully paid, to the prejudice of other creditors, and subject to the action of such other creditors upon the bond, or otherwise. This reasoning applies to several items, which were finally allowed by the Probate Court, upon the ground that the estate of Williams was shown to be solvent. Some other items were objected to, on the ground that the payments were made by Mix before his appointment as administrator; but the court, in our opinion, did not err in allowing them. It was incumbent on the representative of Williams' estate to show that the payments were made with the funds of Williams, otherwise they were a first charge against his succession.

The attorney's fee of $250, for assisting the defendant in making out his account, and attending to this suit, ought to have been, in our opinion, rejected. It is at most only when an account is regularly rendered by the representative of an estate, in the court

under whose authority it is administered, that the expenses attending the rendering of it, are to be paid out of the estate. We can see no good reason why the estate of Williams should pay counsel's fees in this case, any more than in defending any other claim.

The court also erred, in our opinion, in allowing as a credit the sum of $1107 61, paid to the Canal Bank, on the bond of Williams and wife, on the 12th April, 1834. The original receipt on the bond does not show that the payment was made by Mix, in any capacity. A subsequent receipt was given by the cashier, from which it would seem that Mix had paid the money, but it does not appear that he was administrator at the time, nor is the fact that Mix in truth paid the money, supported by the oath of the cashier. Better evidence would have been the statement of a witness on oath.

The other questions of fact in the record, appear to have been correctly decided. The court, however, gave interest on the balance found due at the rate of ten per cent per annum, under the sixth section of the act of 1837, which requires executors, administrators, &c., at least once in twelve months, to render a full account of their administration, under the penalty of being dismissed from office, and paying interest at that rate on all sums for which they shall be responsible, from the date of the expiration of the twelve months. We are of opinion that this statute is inapplicable in the present case. Such a penalty can be given only in cases expressly provided for, and as the payment of the interest forms a part of the penalty, and is necessarily coupled with a removal from office, the one cannot be given without the other. Nor is it justified by the fact that the price of property sold, belonging to the estate of Williams, bore interest after maturity at ten per cent. That stipulation would affect the purchasers but not the administrator of the estate, who may have received payment from them.

It is therefore ordered that the judgment of the Court of Probates be reversed, and ours is that the plaintiff recover of the estate of J. H. Mix, $4605 53, with interest at five per cent from judicial demand, and the costs of the District Court, as well as those of this appeal, to be paid in the due course of administration, subject to the same restriction as is contained in the judgnent of the Court of Probates, relative to the Brandon debt.

On an application, by the counsel of the defendant, for a rehearing of this case, so far as relates to the claim of $1107 61.

BULLARD, J. It is ordered that the judgment in this case be so amended, as to reserve to the defendant the right of claiming from the estate of Williams, the sum of $1107 61, alleged to have been paid by Mix to the Canal Bank, if any such right he have.

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STEPHEN TILDON v. CHARLOTTE DEES, Tutrix.

No order of seizure and sale can be issued against a party, on an act purporting to be signed by an attorney in fact, where no power of attorney was exhibited, nor any authentic evidence of the subsequent ratification of the act was produced, at the time of applying for such order. An order illegally granted under such circumstances, will be rescinded, though on the trial of a motion to dissolve an injunction obtained against such order, facts should be established, by oral evidence, amounting to a ratification by the principal of the act of the attorney.

The tutrix of the minor heirs, cannot administer a succession by virtue of her office as tutrix; she must be appointed administratrix, and give the security required by law. Payment to her of a debt due to the succession, would not protect the party making it, against the claim of the heirs of age, nor of the administrator, should one be afterwards appointed.

APPEAL from the District Court of East Feliciana, *Johnson*, J.

MORPHY, J. Charlotte Dees, the defendant, sued out an order of seizure and sale against Stephen Tildon, to recover $3,130, being the price of a tract of land adjudicated to him at the probate sale of the estate of the late James Dees. She styles herself the mother and natural tutrix of Martha Ann Dees, the minor child of James Dees, and, as such, administratrix of said decedent's estate. She states that the price claimed was payable in three equal instalments, falling due on the first of April of the years 1839, 1840, and 1841, and prays that the sale be made to meet these several instalments, acknowledging at the same time to have received from Stephen Tildon a sum of $958 39, on account of the first instalment. The proceedings were enjoined by the plaintiff on a

variety of grounds, some of which will be noticed hereafter. The defendant filed a written motion, praying that the injunction might be dissolved, and that damages be awarded, under the statute of 1831, against the plaintiff and his surety in the injunction bond; but, should her order of seizure and sale be set aside, that judgment be rendered against the plaintiff for the sums of money claimed in her petition. The judge below dissolved the injunction, and the plaintiff appealed.

The first ground set forth in the plaintiff's petition for an injunction, and which alone it is perhaps sufficient to consider in relation to the alleged illegality of the executory proceedings instituted by the defendant, is, that the act upon which the order of seizure and sale was issued, is not an authentic act importing a confession of judgment, in as much as it was not executed by the plaintiff in person, nor by any one authorized by authentic act to sign his name to the same, and was executed while plaintiff was out of the state of Louisiana.

The *procès-verbal* of adjudication purports to be signed by one J. S. Guay, as the attorney in fact of Stephen Tildon, and no power of attorney was exhibited either to the probate judge who made the sale, or to the district judge who issued the order of seizure now enjoined. It is said that the plaintiff has ratified the purchase made in his name by J. S. Guay, by taking and keeping possession of the land, and by making partial payments on the price. These acts may, and we believe do amount in law to such a ratification as makes the adjudication binding on him, but these were matters *in païs*, proved on the trial of this case by oral evidence. The judge below when the order of seizure and sale was asked, had not, nor could have had before him any authentic evidence of such ratification, and in our opinion, he improvidently granted the order. Code of Prac. art. 732. Civ. Code art. 3361.

The defendant, Charlotte Dees, or rather her counsel, seems to have considered that her capacity of tutrix of one of the minor heirs of the late James Dees, entitled her to the administration of the whole estate, and gave her the right of suing for the debts due to it without the concurrence of the heirs of age. This idea is clearly erroneous, and the very case of *Erwin* v. *Orillon*, in 6 La. p. 213, to which he has referred us, establishes the contrary doc-

trine, if any authority was needed on such a point. In that case, the heirs of age had joined in the suit brought by the tutrix of the minor heirs, and an exception was taken to their capacity to sue in that form. It was contended that as the estate had been accepted with benefit of inventory, an administrator should have been appointed, and that he alone could legally administer on the estate, and collect the debts. The exception was overruled, but the court far from countenancing in any degree the pretension set up in this case, says, 'that in as much as the heirs of age are not represented by the tutor in the event of suits to recover debts due to the succession, they should concur in the prosecution of such suit, as has been done in the present case.' The other cases relied on by the counsel, are not more favorable to him. In one of them, reported in 17 La. 104, we held that a tutrix could not administer a succession by virtue of her office of tutrix of the minor heirs, without being appointed administratrix, and giving the security required by law. A payment to the defendant of the whole amount due to the succession of James Dees, would clearly not protect the purchaser against the claims of the heirs of age not represented by her, or of an administrator, should one be hereafter appointed to the estate, which is said by one of the witnesses to be much in debt.

We might perhaps have proceeded to examine the case on its merits, under the prayer of the defendant for a judgment in the *via ordinaria*, so far as the minor, Ann Martha Dees, is concerned, for Charlotte Dees claims nothing in her own right; but the record, from the contradictory statements we find in it in relation to the number of heirs left by the deceased who are yet living, does not enable us to determine the portion of the claim to which the minor would be entitled as one of the heirs.

It is therefore ordered that the judgment of the District Court be reversed, and that the injunction sued out in this case be made perpetual; the defendant paying the costs in both courts.

Muse, for the appellant.

Lyons, for the defendant.

Albert Bailey v. Philip Stewart.

A statement by the witnesses, in the depositions offered in evidence, that they have been released from all responsibility by the party in whose favor their testimony is produced, is itself an effectual release, and renders the introduction of the original release unnecessary.

Art. 2939 of the Civil Code applies to common carriers; and so does art. 2938, under certain modifications.

Appeal from the District Court of East Feliciana, *Johnson*, J.

Lyons, for the plaintiff.

Muse, for the appellant.

Martin, J. The defendant is appellant from a judgment by which the plaintiff has recovered the value of a trunk of clothing, delivered to the defendant, a common carrier, for transportation, which was lost through the carelessness of the latter. He resisted the claim, pleading the general issue. Our attention is first drawn to a bill of exceptions, taken by the defendant to the reading of the depositions of Brady and Holmes, on the ground that they are interested witnesses, and that if they have been released, the evidence of the fact, results from their depositions only, which is not as good evidence of the fact as the release itself; and further, on the ground that they speak of what they have heard. The court was of opinion that the plaintiff having established the release by the testimony of the witnesses, they were effectually released, as the plaintiff could not gainsay what they had sworn, without admitting himself to have been guilty of subornation of perjury; and the jury were directed to disregard that part of the depositions, in which the witnesses depose to what they had heard other people say. It does not appear to us that the court erred.

Another bill of exceptions was taken to a part of the judge's charge, in which he directed the jury that a common carrier is responsible for the loss or damage of things entrusted to his care, unless the same is occasioned by accidental and uncontrollable events; and that no watchfulness or care was sufficient to discharge the common carrier from liability for goods taken from his custody, unless he showed that they were taken by an overpowering force.

A last bill was taken to the refusal of the judge to instruct the jury, that articles Nos. 2938 and 2939 of the Civil Code, which had been read to the jury, were not applicable as law to the case of common carriers. The court charged them, that article 2938 was not applicable to common carriers, except in a modified manner, but that article 2939 was applicable to them.

The Civil Code, art. 2725, provides that carriers and watermen may be liable for the loss or damage of the things entrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events. They are further subjected, art. 2722, to the same responsibilities as tavern-keepers, whose responsibility does not extend to what is taken by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence. Art. 2939.

This article contains a negative, pregnant with the affirmative that they are liable in other cases.

It does not appear to us that in either case the judge erred; but the decision of the question has no bearing on the present case, for the defendant has not produced the least tittle of evidence as to the manner in which the trunk was lost. During the trial, the defendant attempted to resist the claim against him, by urging that the trunk was not delivered to him, but to one Shepherd, who had theretofore been employed to drive his wagon, but who, at the time that the trunk was placed on the wagon, was not in his service, but had hired the wagon, and was driving it for his own (Shepherd's) account. To this defence the jury does not appear to have paid the least attention, or to have given the least credit. And on a close examination of the testimony by which it was attempted to be supported, we are unable to say that they erred.

At the trial, the plaintiff admitted that he had recovered a part of the goods in the trunk, of which he produced an account, amounting to $128 50, for which he acknowledged the defendant was entitled to a credit. The value of the goods originally in the trunk was proved, and the plaintiff had a verdict for the balance. The defendant has contended in this court, that the plaintiff ought to have produced evidence of the goods recovered, and their value. If the defendant believed that the goods recovered were of a greater

value than they were acknowledged to be by the plaintiff, he might have probed his adversary's conscience by interrogatories.

Upon the whole, we believe that justice has been done in the case.

Judgment affirmed.

ARCHIBALD D. PALMER v. HUMPHREY TAYLOR and another.

In an action for the rescission of the sale of a slave, on account of a redhibitory disease, existing at the time of the sale, and of which he subsequently died, there will be judgment for the defendant, where it is proved that such slave had not received from the plaintiff the attention and care which his situation required.

APPEAL from the District Court of East Feliciana, *Johnson*, J.

Andrews, and *J. P. Bullard* for the appellant.

Lyons, for the defendants, urged that the purchaser of a slave, who is taken sick after the sale, is bound by law, as well as humanity, to cause him to be properly taken care of, and to furnish him with medical attendance; and that in case of his neglect to do so, he cannot recover the price in a redhibitory action. Civ. Code, 2514. *Serapurn, Syndic, &c.* v. *Bousquet et al.*, 15 La., 509.

MARTIN, J. The plaintiff seeks the rescission of the sale of a slave, which he purchased from the defendants, on the ground of a malady existing at the time of the sale, from which the slave afterwards died. The claim was resisted on the plea of the general issue, and on an averment of gross negligence, cruelty, and ill-treatment to the slave by the plaintiff. There was a verdict against him, and after an unsuccessful effort to obtain a new trial, he appealed. A main question was, whether the disease existed at the time of the sale. A number of doctors were examined, and their testimony rather supports the affirmative of the question. One of them only had seen the slave during his illness, and he had seen him but once. A *post mortem* examination was made, and the opinion of the gentlemen present at the examination, was in favor of the existence of the disease at the time of the sale. Several

medical books were referred to, in support of the opinion of the doctors in this respect. The counsel for the defendants laid great great stress on the latter part of the defence, to wit, the neglect of the plaintiff, to afford medical aid to the slave. The testimony does not show that any doctor was ever sent for to visit the negro, but that he was accidentally seen by a doctor who had been sent for to another slave. This gentleman expressed his opinion, that the slave sold by the defendants was dangerously ill. He prescribed for him, but never returned to ascertain the effect of his prescription.* Two or three days afterwards, the slave died in the field, and it does not appear that in the meanwhile, he had received the attention and care due to a sick slave. The impression upon our minds is strong, that this last circumstance had on the jury, the effect which it deserved to havd. Upon the whole, we are unable to say that the verdict is incorrect.

Judgment affirmed.

JAMES PERKINS *v.* WILLIAM DICKSON, Tutor.

To entitle the vendor, under art. 2591 of the Civil Code, to consider as null an adjudication of property offered for sale for endorsed notes, the purchaser must be put in default by being required to name his endorser.

Parol evidence is admissible to prove what occurred at the time of a judicial sale, or subsequently, in relation to a compliance with the terms of the sale.

Extracts from the inventory of an estate, or from the *procès-verbal* of the sales, when duly certified, are admissible in evidence, without producing copies of the whole of the originals.

APPEAL from the District Court of East Feliciana, *Johnson*, J.

BULLARD, J. This is an action to recover a lot in the town of Clinton, which was adjudicated to the plaintiff at the public sale

* This is not strictly correct. Dr. Skipwith, the witness alluded to, testified, that after prescribing for the slave, 'he returned to the plantation the next day, and saw the negro, who seemed to be better.' The prescription was made on the 9th, and the boy died on the evening of the 12th. The testimony is in other respects correctly stated.

REPORTER.

of the property of the estate of Josiah Nettles. The essential facts are stated in the report of the case when before us on a former occasion, when it was remanded with directions to receive in evidence the *procès-verbal* of the sale, without first showing that the plaintiff had complied with the terms of the sale. See 17 La. p. 253. The result of the second trial was a judgment in favor of the plaintiff for the lot, and the defendant has appealed.

It appears from the record that after the lot had been adjudicated to the plaintiff, he proposed to the parish judge to give his notes with an endorser, according to the terms of sale; but that it was postponed and not done until the judge resigned his commission. The plaintiff afterwards called on his successor, and offered to comply with the terms of the sale, but the judge declined to act. It is not shown that the plaintiff was ever put in default, or that the lot was ever afterwards disposed of by the estate.

It is now contended by the defendants, that the purchaser having neglected to give his notes as required by the conditions of the sale, the adjudication became absolutely null, as though it had never taken place, and he relies upon article 2591 of the Civil Code, which provides, that when a thing is exposed at public sale with notice that the buyer shall give endorsed notes for the price, he is bound immediately after the sale, *if required*, to acquaint the auctioneer, or the seller, with the name of the person whom he offers for endorser, and if this endorser does not suit the seller, or, in his absence, the auctioneer, the adjudication is considered as not having been made.

This argument would have great force if the purchaser had been put in default, by being required, in the words of the article, immediately after the sale, to name his endorser. There is no such proof, and we are not authorized to give effect to that article, unless a compliance with its conditions is shown by the party claiming the advantage of such failure by the purchaser. On the contrary, it appears from the testimony of Judge Scott, that the plaintiff was desirous at once of complying with the terms of the sale, and it is not shown that he was afterwards called on for that purpose.

The court did not, in our opinion, err in admitting parol evidence to show what occurred at the time of the auction, or afterwards, in relation to a compliance with the terms of the sale; and extracts

from the inventory, and *procès-verbal* of sales, duly certified, were properly admitted.

But the court erred, in our opinion, in giving judgment for the plaintiff for the lot unconditionally. He should however been required to pay the price, according to the terms of his purchase. In this respect the judgment must be reformed.

It is therefore ordered and decreed that the judgment of the District Court be reversed, that the plaintiff recover the lot described in his petition, with costs in the District Court; but that no writ of possession shall issue, until he shall have paid to the defendant the sum of one hundered and fifty six dollars, with interest at five per cent on one-third, from the 14th of January, 1836, on one-third from the 14th of January, 1837, and on the balance, from the 14th of January, 1838; and that the plaintiff pay the costs of this appeal, provided that the defendant shall not take out execution until after thirty days from the filing of the mandate in the court below.

Muse, for the plaintiff.

J. P. Bullard, for the appellant.

WILLIAM STEWART *v.* SARAH PICKARD and others.

A notary, commissioned by the judge of the Court of Probates to make the partition of community property, is the ministerial officer of the court; and on his certificate of a refusal by the party in custody of the property to produce the same, a distringas may be issued to enforce a compliance.

Errors or irregularities, in a partition of community property made under the authority of a Court of Probates, may be corrected by opposition to the homologation of the partition.

APPEAL from the Court of Probates of East Feliciana, *Saunders*, J.

J. P. Bullard, and *Boyle*. for the appellant.

Muse, and *Lawson*, for the defendants.

MORPHY, J. The plaintiff having brought an action to obtain a

partition, in kind, of the community property held in common between himself and the heirs of his deceased wife, Sarah Pickard, her daughter, and her grand-children, represented by their natural tutrix, Sarah S. Stewart. The whole of the property was partitioned between them, with the exception of the slaves, under a decree of the Court of Probates, of the 21st of August, 1839. Some time afterwards, on the 25th of January, 1840, Sarah Pickard moved the court to fix a day for the completion of the partition, and to notify the parties thereof. The Probate judge accordingly gave notice to the plaintiff and the defendants, that on the 17th of February, 1840, he would attend at the house of William Stewart, for the purpose of completing the partition, pursuant to the decree of the court in the premises. On the appointed day, the judge did not attend in person, but commissioned a notary public to make the partition. The notary repaired to the plaintiff's house, but the latter refused to produce the slaves to be partitioned, which were in his possession, saying that the partition could not be made. The notary thereupon drew up a *procès-verbal*, setting forth his demand of the property to be partitioned, and the plaintiff's refusal to produce the same. Afterwards, Sarah Pickard, aided and assisted by Alexander Pickard, with whom she had intermarried, filed in the Court of Probates the *procès-verbal* of the notary, showing the refusal of Stewart to surrender the property not partitioned, and moved for a rule on the plaintiff to show cause why a writ of distringas should not be issued to the sheriff, ordering him to distrain the movable and immovable property of the said William Stewart, and to detain the same until he should comply with the order of the court. The rule was issued, and the plaintiff having failed to appear, or to make any showing in relation to his refusal to comply with the order of the court, a judgment by default was taken, which was some time after confirmed. A new trial having then been asked for and refused, the plaintiff appealed.

It is difficult to distinguish this case from that of *Traverso et al.* v. *Row*, reported in 11 La., 494. We said in that case, 'that in partitions, the notary is the ministerial officer of the court. His certificate of the refusal of the defendant to produce the slaves which, according to a judgment obtained by the plaintiff against him, were to be partitioned between them, *id est*, to comply with

that part of the judgment which it was his duty to perform, by producing the slaves for appraisement, placed him in the situation of a defendant in the ordinary courts, who refused to comply with a judgment ordering him to do, or refrain from doing something specified in it; and his compliance was therefore to be enforced by a writ of distringas.' The grounds set forth in the plaintiff's motion for a new trial, and which have been relied on in this court, have failed to convince us that there is error in the decree complained of. The mode of making the petition had been determined in the judgment, which ordered it to be made as prayed for by the plaintiff, to wit, in kind. If more than twelve months had elapsed since the date of the last inventory, we are not to presume that the notary appointed to make the partition would have failed to have a new appraisement of the slaves made, which was the very first step to be taken; but this he could not do, unless they were produced for the purpose. As to the claims and contestations which may arise as the partition progresses before the notary, the law points out the manner in which the opinion of the judge, before whom the action is pending, can be obtained. Civ. Code, art. 1290. And if any errors or irregularities are supposed to exist in the proceedings, they can be taken advantage of by way of opposition to the homologation of the partition. Civ. Code, art. 1297.

Judgment affirmed.

THÉRESE HALPHEN, Tutrix v. ALCIDE FUSELIER, Administrator.

An unauthorised admission, made by an attorney in fact, will not bind his principal.

THE plaintiff is appellant from a judgment of the Court of Probates of Pointe Coupée, *E. Cooley*, J.

MORPHY, J. From the petition, in which the facts of this case are expressly admitted to have been correctly stated, it appears

that the petitioners, Jules and Gabriel Fuselier, are two of the heirs of the late widow Constance Ternaut, who died in the parish of Pointe Coupée, in November, 1837. That the proceeds of the sale of her estate amounted to $378,304 90, of which sum the petitioners were each entitled to one-twentieth part, to wit, $18,915, in payment of which they received certain notes and claims by an act of partition which took place among the heirs on the 22d of September, 1838. That at the probate sale of the estate of the widow Ternaut, Edouard Fuselier, one of the co-heirs, became the purchaser of a plantation for the sum of $34,000, payable in three equal instalments, falling due in the month of March, of the years 1839, 1840 and 1841, for which he was to have given notes satisfactorily endorsed, and secured by mortgage on the property, bearing ten per cent interest per annum from maturity, if not punctually paid. These notes were never executed by the purchaser according to the terms of the sale; but it appears from the act of partition among the heirs, that he purchased at the sale, property to the amount of $50,558 87; that of this sum he paid $18,915 in his own hereditary share, and that the balance of $31,643 87, was assigned and transferred to Fergus Fuselier, another co-heir, and to the then minors Jules and Gabriel Fuselier, to whom Edouard Fuselier agreed to pay it as follows, to wit: to Fergus Fuselier $1,673 39¾ in all March, 1839; $1,554 38 in all March, 1840; and a like sum in all March, 1841; and to each of the minors, Jules and Gabriel Fuselier, $4,336 02½ in all March, 1839; $4,547 37 in all March, 1840; and a like sum in all March, 1841; no part of which snms was ever paid by the said Edouard Fuselier, in his life-time. Fergus Fuselier having died on the 8th of October, 1839, Edouard Fuselier, in an act executed before the parish judge, on the 21st of February, 1840, declared, that although the plantation had been adjudicated to him alone, the purchase had in reality been made for the joint account of himself and the said Fergus Fuselier, and that he accordingly transferred and made over one undivided half of said plantation to P. P. Briant, the administrator of Fergus Fuselier's estate, on condition that the estate should pay $17,000, this being one half the price, to the heirs of the late widow Ternaut, on the terms and conditions of the adjudication made to himself. This transfer was shortly after

accepted by the administrator, who had this undivided half of the plantation sold by the Court of Probates, as belonging to the estate of Fergus Fuselier. It was adjudicated to one Ruffin G. Sterling, for $14,100, in payment of which the purchaser gave three notes of $4,700 each, payable in the months of March, of the years 1841, 1842, and 1843. It is admitted that the estate of Fergus Fuselier, who, in his life-time was the tutor of the plaintiffs, is insolvent, and will not even pay their rightful claims against him as tutor, and that therefore no part of the loss arising from the resale of the property can be got out of it.

The present suit is brought to recover of the succession of Edouard Fuselier, who has since died, the difference between the $17,000 which he, or the estate of Fergus Fuselier, was to have paid for the undivided half of the plantation, and the $14,100 for which the same was sold to Sterling, together with the stipulated interest since the former sum became due; the plaintiffs offering to consider the notes of Sterling as standing in the place of a corresponding portion of the debt of Edouard Fuselier, assigned and transferred to them by the act of partition.

Under these undisputed facts, the right of the petitioners to recover, is not, in our opinion, doubtful. Whatever verbal agreements may have been privately entered into between Fergus Fuselier and Edouard Fuselier, of which even there is no evidence, the adjudication constituted the latter a debtor of the estate of the widow Ternaut, for the whole price of the plantation. Of this he seems to have been fully aware, for in the act of partition we find him charging himself with the whole amount of the purchase, and assuming to pay it to Fergus Fuselier and the present plaintiffs. It is true that the preamble of this act recites, that although Edouard Fuselier had purchased this plantation in his own name, he was jointly interested in this purchase with Alcide Fuselier, and Fergus Fuselier; but this statement is immediately followed by the declaration that these joint purchasers will settle this matter among themselves, thus clearly showing that, as regarded the other heirs, Edouard Fuselier was to be considered as the sole purchaser, and that he accordingly undertook to make the payments above mentioned, to the plaintiffs. It is obvious that he could not relieve himself, from this liability, by transferring one half of the plantation to the

estate of Fergus Fuselier, even had there been written evidence of an agreement between them, for the heirs were not bound to look beyond the adjudication which was made to him alone. But even Fergus Fuselier's estate if solvent, would not have been bound by the statements contained in the act of partition in relation to his interest in the purchase, for this act was signed by A. Robin, under a power of attorney from Fergus Fuselier, which did not authorize any such admission, and the administrator of his estate was without authority to accept such a sale. The judge below took a correct view of the rights of the plaintiffs, but he has fallen into an error of fact which materially changes the amount to which they are entitled. Of the $31,643 87, which remained after deducting the hereditary portion of Edouard Fuselier from the whole amount of his purchases at the sale of Ternaut's succession, he endeavored to relieve himself of $17,000, by throwing it upon the estate of Fergus Fuselier. The balance of $14,643 87, he never had given any notes for; and the petition, which, by consent entered on the record, is to be considered and taken as a statement of facts, alleges expressly that he paid no part of it in his life-time. The court nevertheless say in their judgment, that Edouard Fuselier had paid this sum of $14,643 87, and that in the absence of any proof to the contrary, this payment should be imputed to the sums that were due to Fergus Fuselier, as well as to the claims of the plaintiffs. After correcting this error, and making the necessary calculation by adding the stipulated interest of ten per cent per annum to the original price of $17,000, and deducting from the aggregate amounts the notes of Sterling as they fall due, we find that the plaintiffs are justly entitled to a claim of $7069 96, against the estate of the late Edouard Fuselier.

It is therefore ordered that the judgment of the Court of Probates be reversed, and that there be judgment in favor of plaintiffs against the estate of the late Edouard Fuselier, for the sum of seven thousand and sixty nine dollars and ninety six cents, to be paid in due course of administration, with costs in both courts.

Janin, for the appellant. No counsel appeared for the defendant.

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Benjamin Winchester v. Dempsey P. Cain and another.

In a petitory action the plaintiff must recover upon the strength of his own title, not upon the weakness of his adversary's.

Where, by an agreement among the heirs, the community property is adjudicated to the widow, on the condition of her paying the portions due to each of the heirs, such adjudication amounts to a sale, and vests the estate in her.

Any irregularity in the adjudication to the widow of the interest of a minor heir in the property of a community, can only be taken advantage of by such heir, or by those claiming under him.

One against whom a litigious right has been purchased, may be released therefrom by paying the transferree the real price of the transfer, with interest from its date.

Strict compliance with the law, and the police regulations, must be shown, to legalize a sale of land by Commissioners of Roads and Levees, made to pay for work done thereon.

Under the act of the 15th of March, 1830, the owner of lands sold for taxes due to the state, may redeem the same, in the case of non-residents at any time within two years, and in all other cases within one year.

The law authorizing the redemption of lands sold for taxes, will be interpreted liberally.

Appeal from the District Court of East Baton Rouge, *Johnson*, J.

Garland, J. The plaintiff claims a tract of land of fifteen *arpens* front, by forty deep, on the Mississippi river, in the parish of West Baton Rouge, bounded above by lands formerly belonging to Stephen Watts, and below by those confirmed to Jean M. Durand. He says that he holds by mesne conveyances from Louis Mollere, the original grantee of the spanish government, in whose name the claim was confirmed by the United States. The defendants also claim to hold under Mollere; so there is no dispute about the original title, or the *locus in quo*. The question is, which party has the best right to Mollere's title.

Some time previous to March, 1821, Mollere died in the parish of Ascension, where his succession was opened, leaving one minor and six major heirs, and their mother, to represent their respective interests. A family meeting was held in the month of March, 1821, at which it was agreed to let the widow take all the property at the price of the estimation, and to pay the children their respective portions in their father's estate. To this all the major heirs agreed,

either by joining in the proceedings, or by ratifying them subsequently. An inventory was made of the property which was in community between the widow and her deceased husband, on which the tract of land in controversy was placed, and, with the other property, adjudicated to Madame Mollere. In August, 1835, she sold, by public act, all her right, title, and interest, without warranty, to the plaintiff.

The defendants show that in September, 1822, the Parish judge of West Baton Rouge adjudicated to Louis Viales, 'a tract of land of five *arpens* front, belonging to Louis Molier.' The deed recites that this land was sold by the Commissioners of Roads and Levees, duly appointed, for the purpose of paying for work done on said land. In January, 1823, the same Parish judge sold to Louis Viales, a tract of land of fifteen *arpens* front, on the Mississippi river, which belonged to Watt's estate, bounded below by the land of Molier, and which was also sold to pay for work on the roads and levees. This last sale is only material in this controversy as it defines the position of the land in dispute. Both these sales are said to have been made 'by virtue of the regulations of the Police Jury of the parish of West Baton Rouge'; but these regulations are not in evidence.

Louis Viales died, and some time afterwards his widow made a cession of her property to her creditors; and in June, 1829, the Parish judge aforesaid sold at public auction to F. Menard, a tract of land of twenty *arpens* front, for $535. This tract was composed of the five *arpens* front of the Mollere tract, and the fifteen front of the Watts' tract, and in the sale it is said to be bounded on one side by the land of *Molaire.*

On the 12th of October, 1833, the sheriff of West Baton Rouge, 'by virtue of a return made to him by the State Treasurer against the lands of non-residents of the parish of West Baton Rouge, seized all right, title, interest, or demand of Louis *Molire*, in and to a certain tract of land situated in the aforesaid parish on the river Mississippi, containing six hundred superficial *arpens*, more or less, said tract of land having been returned to the State Treasurer for non-payment of taxes, for the year 1819.' The land was sold for $18 16, to the same F. Menard, who had purchased at Madame Viales' sale. The sheriff made him a deed, in which

there is no other description of the land, than that of its being a tract on the Mississippi river, in the parish of West Baton Rouge, containing six hundred superficial *arpens*, more or less. Menard and wife sold to the defendants thirty *arpens* front on the river, which comprised the tracts of Watts and Mollere, with a general warranty for the upper twenty *arpens* front, and a special warranty as to the lower ten *arpens* front.

There are some other facts in the case, that will be noticed in connection with the points made. The widow and heirs of Menard were called in warranty, and have answered, denying their liability as general warrantors, but saying that, if they are so, the title they have sold to defendants is better than that of the plaintiff.

The plaintiff, in addition to his prayer to recover the land, asks damages to the amount of $10,000, for waste and destruction of timber, and for the use of the premises. The defendants also ask for a like sum, for improvements, in case of eviction. There was a judgment of non-suit in the court below; and the plaintiff has appealed.

The defendants say that they are in possession under a *prima facie* title, and that the plaintiff must recover on the strength of his own, not upon the weakness of theirs. This principle is well established. The title of Mollere is not questioned. How then has the plaintiff acquired it? He says, by the adjudication made in March, 1821, to Madame Mollere, his vendee. To this the defendants answer, that the adjudication was a nullity, because the tract of land was not community property, but the separate property of the husband, having been granted to him individually. To this it is answered that all the property which the husband and wife reciprocally possessed at the dissolution of the marriage, is presumed to belong to the community. It is further shown, that the land was put in the inventory as belonging to the community. It seems to have been so considered by the family meeting, and six of the major heirs conceded it to be such, by consenting to the adjudication. As to six-sevenths there cannot be a question; the adjudication amounted to a sale, and vested the interest of the major heirs in their mother, and she could legally sell it. As to the remaining seventh, the plaintiff says that if there is any irregularity in adjudicating the portion of the minor heiress, it is

only relative, and cannot be set up by the defendants, as the heiress does not complain after a lapse of more than twenty years. As to the minor, the adjudication may probably be a nullity, but no one can avail themselves of it, but the minor, or some person claiming under her. The defendants say that they claim under her, by virtue of the sales made to their authors; but we think otherwise. We do not think that any of the rights of the heirs of Mollere have descended to the defendants; and they cannot set them up as a defence. 9 La., 302, 305.

In the argument of the cause in this court, the counsel for the defendants has strongly urged, that the plaintiff purchased a litigious right, and that they have a right to be released from it, by paying him the real price of the transfer, with interest from its date. If the right be litigious, there is no question that such is the law; but the defendants have not set up any such defence by their pleadings, nor do they show that they ever offered to restore to the plaintiff the price he paid to Madame Mollere, with interest, at any time previous to filing their answers. This defence cannot now avail them.

As to the sale of the five *arpens* front of land to Viales, in September, 1822, we are not satisfied of its legality. Mollere was then dead, and the land had been adjudicated to his widow. There is no evidence of any of the formalities of law having been complied with. There is nothing to show what were the proceedings of the Commissioners of Roads and Levees, or that Madame Mollere, or any one representing her, had any notice of the proceedings. There is nothing in the record, except the conveyance from the Parish judge. This court has always held, that a strict compliance with the laws, and the police regulations, must be shown, to legalize sales of this description. 2 Martin, N. S., 455. 5 La,, 45. But as it may be in the power of the defendants to show that these proceedings were conducted legally, we will not preclude them from doing so; and therefore leave the question open for further investigation.

We have not thought it necessary to enquire into the alleged illegalities of the sale made by the sheriff for the taxes of 1819, as it may be admitted that the sale was legal, and still the plaintiff will not be deprived of his rights. He had a right to redeem the land

at any time within two years, under the same law, by virtue of which it was sold, 1 Bullard and Curry's Digest, p. 730, secs. 17, 18; and it is clearly proved that he not only tendered Menard more than he was entitled to receive, but deposited it in the office of the parish judge of West Baton Rouge, within the time of redemption. Menard was therefore bound to reconvey the land, and cannot by refusing to do so, and selling it, deprive the plaintiff of his rights.

The counsel for the defendants insists, that the law authorizing the redemption of land sold for taxes, ought to be rigidly construed. We think otherwise, and a perusal of it, independent of any questions of public policy, satisfies us that the legislature intended that it should be liberally interpreted.

The judgment of the District Court is annulled and reversed, and the cause remanded for a new trial, with instructions to the judge to conform to the principles herein settled, and otherwise proceed according to law; the appellees paying the costs of this appeal.

Janin, for the appellant.

R. N. Ogden, for the defendants.

HIRAM J. THOMAS *v.* NIMROD R. SELSER.

APPEAL from the District Court of West Feliciana, *Johnson*, J.

This case was submitted without argument, on the points filed by *Dalton*, for the plaintiff, and *Sterling*, and *Marks*, for the appellant.

MORPHY, J. This suit is brought by the assignee of a note, not negotiable, against the maker. The defence is that the note sued on was given for the balance due on a purchase of five slaves, bought by the defendant of Archibald Clark, plaintiff's assignor, one of whom, named Caleb, is alleged to have been in the habit of running away previous to the sale, to have run away since, and

to be still out of the possession of the defendant. There was a judgment for the plaintiff, from which this appeal has been taken.

The only evidence adduced by the defendant in support of his defence, is the testimony of his son-in-law. This witness has never seen the negro, nor has he any personal knowledge of his running away either before or after the sale. He testifies, that in a conversation, which took place in his presence, between the defendant, with whom he lives, and Archibald Clark, the latter said that he did not consider the negro a runaway; that, to be sure, he had run away four or five times, but that it was generally from the fear of being whipped, and that he did not stay away over five or six days at a time. If this testimony stood alone and uncontradicted, it might perhaps be considered as making out the plaintiff's case, notwithstanding the caution with which extra-judicial confessions should be generally received, and the relation in which the witness stands to the defendant. But another witness, Dr. Atchinson, informs us, that the slave Caleb belonged to one Dr. Lewis Campbell, of Mississippi, who becoming embarrassed in his affairs, but a very short time before the sale to the defendant, had placed this boy, together with other slaves of his, in the hands of Clark, to be brought to Louisiana for sale. That he, the witness, was intimately acquainted with the family of Dr. Campbell, for four or five years previous to the time when he sent away his slaves to be sold; that the negro Caleb was his wagoner; that he was entrusted with the transportation of his produce to market, and of his family stores home; that he was always held in high estimation by his master, and considered very honest and trustworthy; that he never heard of Caleb's absenting himself from the plantation but once, when, in consequence of a quarrel with his wife, he stayed out one night but returned the next morning. This witness adds, that from his frequent and intimate intercourse with Dr. Campbell and his family, it is next to impossible that Caleb, or any of the negroes, should have run away without his having heard of it. The defendant had it in his power to corroborate the testimony of his son-in-law, in relation to the running away after the sale, a fact of which his testimony itself shows that he had no knowledge except from hearsay. He says that the boy Caleb was hired by defendant, soon after the purchase, to one Clopton, living in the adjoining parish, and that he

ran away from him. We find in the record, interrogatories propounded to this Clopton, who could have testified directly to the fact, but they were never answered. It does not appear that any time was asked by the defendant to obtain the return of the commission, if it ever issued; and after the judgment no motion for a new trial was made. The defendant was pleased to rest his case wholly on the admissions of Clark, as testified to by his son-in-law, in relation to facts of which Clark could know but little, and which are positively contradicted by another disinterested witness. The judge *a quo* either disbelieved the evidence of the defendant, or found it insufficient. We see nothing in the record which makes it our duty to reverse the judgment complained of.

Judgment affirmed.

Michael Culliver v. Jean P. Berge and another.

A recognition, by the principal, of a deed executed by an agent whose procuration has been lost or mislaid, renders the deed valid *ab initio;* and where it sets forth the tenor of the original conveyance, the production of the latter will be unnecessary. So, where the act of recognition emanates from a public officer, the successor of the one, who, in his official character, was authorized to make the original deed.

The act of Congress of the 3rd of March, 1819, authorizing the sale of certain military sites, did not confer an authority personal to the Secretary of War then in office; the power conferred was given to the Department of War, to be exercised under the discretion of the President of the United States. Nor is it material whether the acts authorized by it, were executed by the Secretary himself, or by some officer acting under his authority.

It will not be presumed that an act of one of the Executive Departments, was performed without the concurrence of the President; and his directions in the premises, or ratification of the act, need not be shown. In the performance of his constitutional duty to see that the laws are executed, the President acts generally through the Executive Departments; and the acts of these Departments must be considered as his.

An exchange of a military site for other land, is valid as a sale, under the act of the 3rd of March, 1819, authorizing the sale of certain military sites. An exchange is, in effect, but a double sale.

THE plaintiff has appealed from a judgment of the District Court of East Baton Rouge, *Johnson*, J., in favor of Esther Minville, one of the defendants, and the lessor of Berge, quieting her in the possession of the property in controversy.

BULLARD, J. This case has been twice before this court, and on the last occasion was remanded in order to enable the plaintiff to furnish legal evidence of the authority of Captain Rogers to convey the land in controversy to Hall, under whom he holds. See 13 La. 137.*

On the last trial, the plaintiff produced an instrument, executed by the late Secretary of War, bearing date the 2d of May, 1840, in which it is recited, that instructions had been sent from the Quarter Master General, in 1819, by order of the then Secretary of War, authorizing Captain Thomas S. Rogers, then an Assistant Deputy Quarter Master General, to exchange a part of the land of the United States occupied as a military site in the parish of East Baton Rouge, for other land adjoining; that it appears that in pursuance of said authority, the said Rogers had entered into a deed or act of exchange, which is set forth at full length as it existed of record in the office of the parish judge; that the power of attorney referred to in said act of exchange, was afterwards withdrawn from the office of the parish judge; therefore the Secretary, in consideration of the premises, and by the authority of the act of Congress of the 3d of March, 1819, recognizes the sale and exchange set forth in said deed as having been duly authorized, and ratifies and confirms the same in every particular, so far as it regards said Rogers, except as to warranty, &c.

Such a recognitive act, in case of an individual, would supply the only defect in the deed made by an agent, whose procuration had been lost or mislaid. It would be an acknowledgment of such authority by the only person having an interest to contest it, and would without doubt render the deed valid *ab initio*. It would be regarded as a recognitive act, or *certa scientia*, setting forth the tenor of the primordial title, and consequently dispensing with the production of its original. Pothier Ob. No. 743. How is it

*This case is reported in 11 La. p. 88, and in 13 La. p. 137, under the title of *Culliver v. Garrts et al.*

different, when the recognitive act emanates from a public officer, the successor of him who, in his official character, was authorized make the original contract? Let it be observed here, that in the case of a natural person, if he were shown to be in the possession and enjoyment of the thing given in exchange, it would go far towards proving the authority to make the exchange in the agent, and would amount perhaps to a ratification. The act of Congress did not confer an authority, personal to the then Secretary of War. It was given to that Executive Department, under the direction of the President of the United States, and the only difficulty which the case ever presented, consists in the want of proof that Rogers was empowered by that Department to make the sale or exchange. It does not appear that the act of Congress in question has been repealed, and consequently the present Secretary of War possesses the power, originally granted to his predecessors, to dispose of certain military sites; and we see no good reason to doubt the validity of an act, within the sphere of that authority, which he acknowledges was done by the Department through its agent, when the functionary thus ratifying the act, still has the power to make the contract, if it had not been done before. This recognitive act therefore, in our opinion, supplies the defect of evidence on the former trials of this case, and especially on the last, when an extract of a letter from the Quarter Master General to Captain Rogers was produced, certified *upon honor*, which we did not regard as sufficient legal evidence. It was neither sworn to, nor officially certified by the head of the Department.

But it is contended that the Secretary of War alone had authority to sell, under the direction of the President, and that the conveyance to Hall was not a sale, and does not appear to have been done by the Secretary, nor with the sanction of the President. We do not consider it material whether the act was done by the Secretary himself, or by some officer acting under his authority. If it was considered that the duty of executing the will of Congress relating to military sites, belonged more appropriately to that branch of the War Department administered by the Quarter Master General, we see no objection to it; nor can we presume that the Executive Department, acting under the express authority of an act of Congress, has acted without the concurrence of the

President of the United States; and his direction in the premises, or his ratification of the contract, need not, in our opinion, be shown. It is well known that the President, in the performance of his constitutional duty to see that the laws are executed, acts generally through the Executive Departments; and the acts of those Departments are considered as emanating from the President.

The objection that the act of Congress authorized a sale, and not an exchange, has not much weight. An exchange is nothing more, in effect, than a double sale. In the case now before us it does not appear to us material, whether the price in money was paid into the Treasury, or the property, received as an equivalent, appropriated and employed for the public service. In either case, there is a disposition of a part of the domain for a legal consideration: and the government appears to be in the enjoyment of the ground received in exchange. Under these circumstances, we are compelled to consider the United States as having parted with its title, at the time that the defendant's patent was obtained, and that the latter confers no right, so far as the plaintiff is concerned; and that he is entitled to recover the lot in controversy.

The judgment of the District Court is therefore annulled; and it is further ordered that the plaintiff recover the lot of land described in his petition, with costs in both courts.

Elam, for the appellant.

B. N. Ogden and *A. N. Ogden*, for the defendants.

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ELECTA B. BERTIE v. JOHN C. WALKER, Sheriff.

A decree, for the separation of property, obtained by the wife, whatever may be its terms, does not render the parties separate in property. It entitles her to a separation, but will be forfeited and wi hout effect, if not followed by a prompt and *bona fide* execution of the judgment, either by the payment of the rights and claims of the wife, so far as the estate of the husband can meet them, made to appear by authentic act, or by an uninterrupted suit to obtain such payment.

Plaintiff having obtained a decree for separation of property from her hutband, purchased a slave in her own name. Five months after the decree, the slave was seized at the suit of creditors of the husband; and seven months after the seizure she took out execution against her husband. The creditors alleged that the slave was seized in the possession of the husband, and was paid for by money furnished by him; and no evidence was offered to disprove these allegations. *Held*, that an attempt to execute the decree of separation after such a length of time, could not affect the rights of the judgment creditors; that the decree was forfeited, and the community not dissolved; that the property having been purchased in the name of one of the spouses, belonged to the community, and was liable to seizure for the debts of the husband; and that there was no necessity for the creditors to institute a direct action against the wife, to annul the sale.

APPEAL from the District Court of East Feliciana, *Johnson*, J.

Dunn, for the appellant.

J. R. Thomas, for the defendant.

MORPHY, J. In November, 1838, the petitioner obtained against her husband, James E. Bertie, a decree of separation of property, allowing her as her paraphernal effects a piano worth about three hundred dollars, and a sum of fifty dollars, belonging to her, and collected by her husband. After the rendering of this judgment, to wit, on the 14th of February, 1839, she bought a negro slave named Matilda, in her own name, for the price of eleven hundred and fifty dollars. This slave having been seized by the defendant, at the instance of Fellows, Cargill, and Company, judgment creditors of her husband, to satisfy their demand against the latter, this suit was brought to arrest the sale about to be made. The injunction sued out by plaintiff having been dissolved below, she appealed.

It is urged on the part of the appellant, that the slave in question is not liable to be izedand sold for the debts of James E. Bertie, her husband, because she was purchased by the petitioner subse-

quent to the judgment of the District Court, pronouncing a separation of property between her and her said husband; that, at all events, the validity of her title cannot be inquired into collaterally; and that a direct action should have been brought to annul it. To this it is answered, that the decree of separation is void, and produced none of its legal consequences, because it was not executed according to law; and that this slave, although purchased in the separate name of the plaintiff, must be considered as community property, and as such, must be subject to seizure for the debts of her husband. It appears from the record that the plaintiff took out an execution against her husband only about twelve months after the judgment of separation, and about seven months after the seizure of the slave Matilda by his creditors.

The Civil Code, article 2402, provides, that 'the separation of property, although decreed by a court of justice, is null, if it has not been executed by the payment of the rights and claims of the wife, made to apppear by an authentic act, as far as the estate of the husband can meet them, *or* at least by a *bona fide* non-interrupted suit to obtain payment.' In the Code Napoleon, art. 1444, from which this article is evidently borrowed, it is provided that there must be a beginning of pursuit, or proceedings under the decree of separation, within fifteen days from its date. The suppression in the Civil Code of this delay, within which some pursuit must be commenced against the husband to render the separation valid, renders our law on this subject less rigorous, but at the same time perhaps more vague, and difficult in its application to particular cases. By the french law the decree of separation becomes a nullity, if no settlement or proceedings take place under it, within fifteen days, and no subsequent execution of it can give it validity; while from the language of the provision in our code, it seems that the decree is not perfected, and has no binding force until one of the two conditions mentioned in it has been complied with. As relates however to the execution of the decree by judicial proceedings, it may well be that an unusual delay or interruption would be fatal to the wife. The decree of separation, whatever may be its terms, does not render the parties separate of property; it entitles the wife to a separation, but this right vanishes, if not followed by a prompt and *bona fide* execution of the judgment. It is all im-

portant for the protection of the creditors of a married man under a system of laws like ours, that these requisites of the code should be rigorously insisted upon. Decrees of separation are not unfrequently made a cloak to screen the property of the husband from the pursuit of his just creditors. In the present case, neither of the two conditions required to render the separation, valid had been complied with at the time that the slave Matilda was seized. Matters stood then as if no separation had been pronounced, at least so far as the seizing creditors in this case were concerned. They alleged in their intervention, that the slave was seized in the possession of the husband, and that the price paid for her was furnished by him, and we find no evidence in the record to disprove these allegations. The tardy attempt to execute the decree of separation several months after the seizure, cannot affect the rights of the judgment creditors, if they had acquired any under it. If the separation was null at that time, the community was not dissolved, and property purchased in the name of either of the spouses belonged to the community, and was therefore subject to seizure for the debts of the husband. Civil Code art. 2371. 13 Toullier No. 82. Under this view of the subject, we cannot see that there was any necessity for the creditors of James E. Bertie to institute a direct action against the plaintiff.

Judgment affirmed.

JOHN D. TOWNSEND and another v. JAMES H. CALDWELL.

In an action on a contract, the original of which has been lost, it will be sufficient to allege the loss, and to state its contents, in the petition; proof of the loss, need not be offered previous to the trial.

Art. 3499 of the Civil Code, which prescribes the action of workmen and laborers for their wages after one year, does not apply to an action by workmen, for specific work, done under a written contract.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

The plaintiffs claim a balance due, under a written contract, for work done in 'filling up nineteen door openings in the first tier of boxes in the building known as the St. Charles Theatre, for which the defendant bound himself to furnish the necessary materials, and to pay the sum of one thousand dollars.'

Durant, for the plaintiffs.

Sterrett, and *Carter*, for the appellant.

GARLAND, J. This suit is brought to recover a balance owing for work and labor done on the St. Charles Theatre, in the year 1835, by the plaintiffs, who are carpenters. A written contract was entered into, which appears to have been lost, by which the defendant agreed to pay $1000, for the work; and it isadmitted that he has paid all, except the sum of $346 21. The defendant excepted to answering the petition, on the grounds:

First, That a written contract is alleged to have existed, but no copy, or sufficient statement of its contents are given, nor any proof filed of the loss of the original.

Second, That admitting the allegations of the petition to be true, the plaintiffs cannot recover, nor maintain their action.

These exceptions were overruled, the defendant filed no answer to the merits, a judgment by default was made final against him, and he appealed.

As to the first exception, it seems to us, that the contents of the alleged contract were sufficiently made known to enable the defendant to answer. The work to be performed, the price, the time when it was to be completed, and other particulars, are given with accuracy. It does not appear to us that any copy was necessary, to enable the defendant to shape his defence.

As to the loss of the contract, it was not necessary that proof of the loss should be offered previous to the trial. It was alleged, and that was enough for the defendant to know, previous to joining issue.

We cannot see on what ground the defendant expected to sustain his second exception. The allegations of the petition very distinctly set forth the cause of action. Both exceptions were properly overruled.

The evidence very clearly sustains the plaintiffs' demand.

In this court, the defendant has filed a plea of prescription; but

it cannot avail him. The plaintiffs are not the description of workmen and laborers, spoken of in the article 3499 of the Code. 6 La., 591. 10 Ib., 229.

Judgment affirmed.

JEAN FRANÇOIS LAVILLE v. PIERRE ADOLPHE HÉBRARD and another. | 1r 435 52 964 |

The proceeding under the 13th section of the act of the 20th of March, 1839, authorizing a plaintiff to propound interrogatories to third persons touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, was intended to enable the plaintiff to get at property belonging to the defendant, in the possession of third persons; but it cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage, or means of defence, they would have in a direct action against them.

Art. 1988, declaring that a creditor cannot sue to annul a contract made before the time when his debt accrued, applies to contracts apparently complete and regularly carried into effect by the debtor, and does not extend to cases where the latter has never been out of possession of the property pretended to have been sold, and where third persons have treated with him on the faith of his being the owner of the property so found in his possession.

Facts, appearing from interrogatories which a party had no right to propound, will not be noticed.

APPEAL from the District Court of the First District, *Buchanan*, J.

Pepin, for the plaintiff.

Benjamin, for the defendants.

MORPHY, J. This suit comes before us under circumstances, nearly, if not entirely analogous to those of *Samory* v. *Hébrard et al.*, reported in 17 La., 555. The plaintiffs having obtained against François Lafargue two judgments, bearing date the 13th of January, and the 1st of May, 1838, applied for writs of *fieri facias*, and proceeded, under the thirteenth section of the statute of 1839, to

garnishee Pierre Adolphe Hébrard, and Antoine Hébrard. He propounded to them interrogatories on the 2d of January, 1840, tending to show the simulation of certain sales executed to them by F. Lafargue, before F. Grima, notary public, on the 18th of March, 1837. The garnishees excepted to these interrogatories on the ground, that this proceeding on the part of the plaintiff was, in substance, the exercise of a revocatory action to divest them of their title, and that his right of action, if any he ever had, was prescribed by his own showing. This exception, and plea having been sustained by the inferior judge, the plaintiff appealed.

In the case above referred to, we said, that 'the proceeding under the act of 1839, was intended to get at property in the possession of third persons belonging to a defendant; but it cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in such third persons. By such a proceeding, the latter cannot be deprived of any means of defence, or advantages they would have in a direct action brought against them.' It is clear, that had plaintiff brought a direct revocatory action, in the present instance, to annul or revoke the sales made on the 18th of March, 1837, he would have been successfully met by the plea of prescription, because such sales were passed nearly three years before the institution of his suit, and more than twelve months after the date of his judgment. Civ. Code, arts. 1982, 1989. On the authority of the case of *Thibodeaux* v. *Thomasson et al.*, reported in 17 La., 353, it has been strenuously contended, that the prescription established by these articles of the Civil Code, should not bar the plaintiff's right to have these sales annulled. The case relied on refers to a different provision of the Code, and to a state of facts not presented in this case. It decides that article 1988, which refuses the revocatory action to a creditor whose debt has accrued after the contract sought to be annulled, applies to contracts apparently complete, and regularly carried into effect by the debtor; but that it does not extend to the case where the debtor has never ceased to be in the possession of the property apparently sold, and where third persons have treated with him, on the faith of his being the owner of the property they found in his corporal possession. It may be, that on such a case being presented to us, under proper allegations, and in a proper

form, we might make the same distinction, and refuse to apply the prescription of one year. In the case before us, the plaintiff himself alleges that the Hébrards have the property in their possession, and under their control. He seeks, moreover, to maintain a revocatory action, in a form not, in our opinion, authorized by law. We cannot notice any facts that may appear from interrogatories, which he had no right to propound.

Judgment affirmed.

GABRIEL SHAW and others *v.* JOHN C. HARRISON and another.

THE defendants are appellants from a judgment of the District Court of the First District, *Buchanan*, J., in favor of the plaintiffs.

BULLARD, J. The present defendants, having attached certain bills of exchange, or their proceeds, in the hands of Byrne, Stiff and Co., as the property of their debtors, C. D. Tolmé and Co., recovered judgment, reserving the rights of Thomas Wilson and Co., the present plaintiffs, if any they had, to the funds attached. The present action is brought to enforce that right, and to recover the amount received by the defendants, on the allegations, that the funds belonged to the plaintiffs, and not to Tolmé and Co., and that the funds, or bills, and drafts attached, were given and appropriated to the just payment of a debt due to them by Tolmé and Co.

We cannot distinguish this case from that of the same plaintiffs against Lizardi and Co., 15 La., 255. The bills of exchange remitted by Tolmé and Co. to Byrne, Stiff and Co., with orders to invest their proceeds in sterling bills, and to remit the amount to Wilson and Co. in London, never became, in our opinion, the property, and were not at the risk of the latter. On the contrary, the evidence shows, that according to the course of dealing between the plaintiffs and Tolmé and Co., if the proceeds of these bills, when invested in sterling exchange and remitted to the plaintiffs, had be-

come unavailing in consequence of their being dishonored, they would have been charged to the house in Havana, and would not have been treated as at the risk either of the plaintiffs, or of the joint exchange account.

The judgment of the District Court is therefore reversed, and ours is for the defendants, with costs in both courts.

Preston, for the plaintiffs.

T. Slidell, for the appellants.

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André Marchesseau v. The Merchants Insurance Company of New Orleans.

The contract of insurance is, essentially, one of indemnity; and this indemnity must be adjusted on the principle of replacing the insured, as near as may be, in the situation he was in at the commencement of the risk. The amount of insurable interest is the market value of the articles at the time and place of the commencement of the risk; and where they have been purchased near that time and place, the cost to the assured is the most satisfactory, though not the only criterion of their value.

Under a policy of insurance, which provided that if there should be any false swearing on the part of the assured, he should forfeit all claim to the policy, a failure by the latter to sustain his affidavit, by direct evidence, to the amount claimed, will not be considered as proof of his having sworn falsely, and thereby forfeit the insurance. In open policies, it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by testimony the great probability of the truth of the affidavit; and in weighing this testimony, the character of the assured, as well as the credibility of the witnesses, must be considered.

Appeal from the Parish Court of New Orleans, *Maurian*, J.

Garland, J. This suit is brought to recover $15,549, on an open policy of insurance against fire, on certain merchandize in a shop in New Orleans, which was consumed on the night between the 29th and 30th of September, 1838. The defendants say, they are not responsible, because the plaintiff has not sustained a loss to the amount claimed. They allege that proper preliminary proof had not been furnished, and that no inventory was ever presented

or deposited with them. They further say, that after diligent inquiry, they are unwillingly induced to believe, and so aver, that the conflagration occurred with the knowledge of the plaintiff: that he participated in it through his agents; and that if any loss has occurred, they are not responsible under the terms and qualifications of the policy, as to good faith on the part of the assured.

The evidence shows that the plaintiff arrived in New Orleans, in December, 1837, or in the commencement of the year 1838, with a stock of goods from France; that he opened a shop, and did business as a merchant until sometime early in July following, but to what extent is not clearly shown. On the 2d of July, the defendants signed the policy, and it appears very certain that the plaintiff had about that time made an inventory of the goods, which, he says, he had on hand, and that when he went to effect the insurance, he took it with him; but a secretary or clerk in the office says, that he refused to take it, although offered to him, or even to look at it. This witness says, that the plaintiff took it away, and that he has never seen it since. He did not even look at it for the purpose of filling up the policy, as it was not customary to receive inventories, the plaintiff having told him the amount. The plaintiff departed for France a few days after effecting the insurance, and the house in which the goods were stored was destroyed by fire nearly three months afterwards, he being absent.

The clerk of the plaintiff says, that he assisted in making the inventory. He called out the numbers and prices of the goods, and the plaintiff wrote them down; they were then packed in boxes, baskets, or bales, and carried by another person to the third floor or garret of the building. There were three or four hundred packages. There is abundant testimony, that there were a great many packages, and no doubt that they were full of something. It is proved that the key of the store was left in the possession of the owner of the house, but that it was occasionally given to François Marchesseau, a brother of the plaintiff, who was acting as his agent, although he had no special authorization, and visited the shop occasionally. The evidence on the part of the plaintiff is perhaps sufficiently certain to sustain the verdict, except in two important particulars, to wit, that none of the witnesses swear to the

value of the goods, and that there is no explanation of the great difference existing between the value, as it appears from the invoices filed in the custom house, on which the plaintiff made his entries and paid duties, and the large amount at which the same goods are valued in the inventory. Pascal, who assisted as clerk in making the inventory, does not swear that the goods were put down at their true market value, nor that there was the quantity stated. He says that 'he called the numbers and prices,' and that the plaintiff wrote them down; but he no where says, that they were correctly written down, as to quantity and value. Other witnesses fully corroborate Pascal in his statement as to the marking of the inventory, but none fix any particular value on the goods. It is shown that the plaintiff brought all the goods from France; they must then have passed legally through the custom house. From it, the defendants have procured copies of the invoices on file, and they do not amount to much more than one-third of the sum claimed. They were sworn to by the plaintiff, and the defendants insist that he shall abide by them, adding thereto a fair allowance for risk and charges, and then deducting the probable amount of the sales made in the course of six months of business.

The jury found a verdict for $8000, on which judgment was rendered in favor of the plaintiff; and the defendants, after an ineffectual attempt to obtain a new trial, appealed. They ask us for an entire reversal of the judgment, and the plaintiff asks that it be amended, so as to give him the whole amount claimed.

In this court the defendants have waived the question as to the preliminary proof, and have met the plaintiff by an accusation of attempting to defraud them by false swearing, and by an overvaluation of the goods, by which they say the policy is forfeited according to its ninth condition, which is as follows:

'All persons assured by this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company; and, as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation, and also, if required, by their books of account, and other proper vouchers; they shall also declare on oath, whether any and what other insurance has been made

on the same property; and until such proofs and declarations are produced, the loss shall not be payable. Also, if there appear any fraud, or false swearing, the claimant shall forfeit all claim by virtue of this policy.'

Upon a thorough examination of the evidence, we are not satisfied with the verdict of the jury, nor are we convinced that the defendants' accusation of fraud and perjury is sustained. It is evident that the jury did not think, that a loss to the amount claimed had been sustained, but that they thought that there had been some loss, and allowed $8000 to cover it. In questions of this kind, we are disposed to pay much respect to the opinions of a jury, but in this case we are unable to see from the testimony, how they could arrive at the result, to which they came. The definite or approximate value of the goods is not proved by a single witness, though it is certain that he had a considerable stock on hand; and the great disparity between the invoices and the inventory is unexplained. On the other hand, the conduct of the defendants is not altogether free from suspicion and reproach. When the insurance was effected, an inventory and valuation was offered, by which they might have seen what they were insuring, and from an examination of it have found whether the goods were estimated too highly. To get the premium seemed then the principal object; and after the loss occurred, the evidence shows that they were disposed to stand upon the most rigid rules both of etiquette and law. The evidence is calculated to produce the impression, that documents or papers in relation to the loss, and preliminary proofs were unwillingly received, and that when left against their wishes, that they were lost, destroyed, or suppressed. They probably acted under a suspicion of some unfair proceedings on the part of the plaintiff or his brother, but we cannot see any evidence to justify a charge that the plaintiff was in any manner the cause of the fire and consequent loss of the property, however guilty others may have been. He had been absent from the state nearly three months in Europe, the key of the house was in the possession of the owner, and no one is shown to have been in the shop for some ten or eleven hours previous to the fire.

The contract of insurance is one essentially of indemnity; and good faith, on both sides, should be its basis. It is not its object to

put the assured in the same situation, in case of loss, in which he would have been, had the adventure, on which it was effected, terminated successfully. He must, particularly in open policies, take some of the chances of his speculation, and of the state of the markets. The indemnity must therefore refer to the beginning of the risk, and the losses are to be adjusted on the principle of replacing the party assured, as nearly as may be, in the situation he was in at that time. The amount of insurable interest is the market value of the goods at the time and place of the commencement of the risk, and the best, though not conclusive criterion of this interest, is the cost to the assured. This is the most satisfactory proof of value, in case the goods were purchased near the time when, and at or near the place at which the risk commences. Therefore we do not look upon invoices of goods, purchased in France some eight or ten months previous to the commencement of the risk, as the true criteria of value here; but when they are produced, and it appears that there is a difference of nearly three hundred per cent, it certainly requires explanation, and strong evidence of there being so great a difference in the state of the markets in the two countries.

We are not disposed to go to the extent contended for by the defendants' counsel, that if the plaintiff fail to sustain his affidavit by direct evidence, to the amount claimed, he is to be considered as having sworn falsely, and thereby having forfeited the policy. In open policies it would, in many, if not in a majority of cases, be extremely difficult to prove the actual value of the goods lost. It is therefore sufficient to show by testimony the great probability of the affidavit being true, and, in weighing this testimony, the character of the assured is a circumstance to be considered, as well as the credibility of the witnesses. The character of an assured party is not to be blasted, and his policy forfeited for which a premium has been paid, simply because he cannot prove the value of every article lost. But if an account is made out to be feigned or fraudulent, there cannot be a doubt, but that the policy is forfeited; and a wide difference between the cost and the valuation, is a strong circumstance, and, if unexplained, should have its due weight upon the jury. This seems to have been the opinion of the court in the case in the 20th English Common Law Reports, 158, so much relied on by the counsel for defendants, and we shall pursue the same

course that was adopted in that case, and grant a new trial, more particularly as both parties complain of the verdict.

The judgment is therefore reversed, and the case remanded to the Parish Court for a new trial; with directions to the judge thereof, to proceed therein in conformity to the principles herein expressed, and according to law; the plaintiffs and appellee paying the costs of the appeal.

Roselius, for the plaintiff.

Grymes, for the appellants.

CHARLES TIERNAN v. JAMES K. MURRAH and another. 1 r 443 48 105

Where the circumstances authorise it, a court may, in rendering judgment in favor of a party, make its execution dependent on the condition of the production of books and papers in the possession of the latter.

A clerk has a general privilege on all the property of his employer. A sale, accompanied by delivery, destroys this privilege; not so an attachment. The property attached belongs to the original owner, until divested by a sale; and the privilege of a clerk, will entitle him to be paid in preference to the attaching creditor.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted without argument, by *G. Strawbridge*, for the plaintiff, and *Elwyn*, for the appellant.

MARTIN, J. This suit being commenced by attachment, Benjamin A. Gamble, a clerk of the defendants, intervened, claiming to be paid for his services, by privilege, out of the property attached. The plaintiff had judgment against the defendants; but the court directed that the intervenor should recover the sum of $164 80, with five per cent interest thereon, from the 11th of March, 1840, to be paid by preference, with the costs of the intervention, on condition, however, that he should, within eight months from the date of the judgment, place in the hands of the clerk of the court, the day book, journal, ledger, bill books, cash books, bank books, and all other papers or books, if any, belonging to the firm of Gamble,

and Murrah, and that in default of so doing, the amount so decreed to him, should be paid to the plaintiff.

The intervenor appealed. His counsel has contended that the court erred in fixing the rate of his compensation at $2000 per annum, instead of $2500, and in saddling the judgment rendered in his favor with an unreasonable and illegal condition, not warranted by law, not demanded by either party, nor shown by the evidence to be equitable or legal.

The counsel for the plaintiff and appellee has urged, that the appellant has no privilege, because there is no cession of goods. That in *Emerson* v. *Fox*, 3 La., 183, and in 8 Martin, 511, it was settled, that the seizing creditor must be paid in preference. That a clerk's privilege is a general one only. That special privileges, like the lien of the common law, exist not only in cases of actual insolvency, but even where the debtor is solvent, *e. g.*, if property under pledge be attached, the pledgee must be first paid; so of the landlord, in case of furniture, and seamen, in the case of a steamboat, etc. That a general privilege can never be enforced on the debtor's property, until declared insolvency, or a *cessio bonorum*. That this results positively from the textual provisions of the Civil Code, art. 1981, which declares that, 'no sale of property in the usual course of business, nor any payment of a just debt in money, shall be annulled, although the debtor was insolvent, and the person contracting with him knew it'; citing also art. 2628, and the case of *McManus' Syndic* v. *Jewett*, 9 La., 170, and *Thompson* v. *Gordon*, 12 Ib., 260. The counsel for the plaintiff has further insisted, that the intervenor cannot have even a conditional judgment, until he restores the books, papers, etc.

A recurrence to the testimony has satisfied us that the court did not err in the rate of compensation adopted, nor in requiring the deposit of the books, etc., in the clerk's office. The testimony shows also, that the defendants failed shortly after the intervenor came into their service. Marcus Patton swears to this fact. They went away, and have never returned; their landlord seized their property, etc. It is admitted that the intervenor had a *general* privilege. Such a privilege extends to all the property of the debtor. A sale, accompanied by delivery, destroys it, because the property of the vendor then ceases. Not so the attachment, for

until a sale puts an end to the property of the vendor, he remains the owner of the goods attached, for they are still at his risk. *Res perit domino.*

Judgment affirmed.

Harmonius Garretson v. His Creditors.

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The right of the lessor over the products of the estate or the movables on the place leased, is of a higher nature than mere privilege. The latter is enforced only on the price of the movables to which it applies; it does not enable the creditor to take, or to keep the effects themselves. The lessor, on the contrary, has a right of pledge on them; and may seize and retain them, until he is paid.

The privilege of the lessor on the products of the estate or on the movables on the place leased, has a preference over all other privileged debts, such as expenses of the last illness, law charges, and others having a general privilege on the movables. The charges for selling the movables subject to the lessor's privilege, must be paid before the rent, as they are necessary to procure the means of paying it; and so of the funeral expenses of the debtor and his family, where there is no other source from which they can be paid.

Where the amount applicable to the payment of the law charges privileged against the estate of an insolvent, is insufficient to pay the whole, they must be paid *pro rata.*

Appeal from the Commercial Court of New Orleans, *Watts*, J. *Roselius*, for Hoey, the appellee, argued the case, *ex parte.*

Morphy, J. The syndic in this case, filed a tableau of distribution, showing the privileged claims and charges against the estate, and prayed to be authorized to pay the same in accordance therewith. The money to be distributed amounts to $2,164 04, and is the proceeds of the sale of a stock of house-hold furniture which the insolvent had in a house belonging to Nicholas Hoey, whose claim for rent is admitted to be fifteen hundred dollars. The law charges, including $100 for wages due to a laborer, amount to no less than $1050 75, which sum is deducted on the tableau from the proceeds of the furniture, leaving, after reserving a sum of $100 in the hands of the syndic, only $1013 29, to be applied to the payment of the house rent. A memorandum at the foot of the tableau,

shows that the notes and accounts of the estate, were yet on hand to be collected. To this tableau, Hoey made opposition, claiming to be paid out of these proceeds, in preference to all the creditors therein set down. The judge below sustained his opposition, and ordered his claim to be paid in preference to all the creditors on the tableau, except the auctioneer for his commission and the incidental expenses of the sale of the movables, amounting to $115 10. The balance in the hands of the syndic, he ordered to be distributed *pro rata*, among all the creditors for law charges. The syndic appealed.

The judge, in our opinion, decided correctly. The lessor is treated with peculiar favor by the Civil Code. In the language of article 3185, his right is of a higher nature than a mere privilege, the latter is enforced only on the price of the movables to which it applies; it does not enable the creditor to take or keep the effects themselves in kind; the lessor, on the contrary, may take the effects themselves, and retain them until he is paid; he has on them a right of pledge. Article 3223 provides, that the charges for selling the movables, subject to the lessor's privilege, are to be paid before the rent, because these charges procure the payment of the rent. The following article says, that when there is no other source, from which the funeral expenses of the debtor and his family can be paid, they have a preference over the debt for rent or hire, on the price of the movables contained in the house or on the farm; and article 3225 enacts, that the lessor has a preference on the price of these movables over all the other privileged debts of the deceased, such as expenses of the last illness, and *others which have a general privilege on the movables*. The debts having this general privilege on the movables, are enumerated in article 3158, and among them are the law charges. But if any doubt could remain after the perusal of the above provisions of law, they must, we think, be removed by article 3237, which provides, that when the privileged debts on the movables and immovables cannot be paid entirely, either because the movable effects are of small value, or *subject to special privileges which claim a preference*, or because the movables and immovables together do not suffice, the deficiency must be borne proportionably among the creditors, but the debts must be

paid according to the order above established, and the loss must fall on those which are of an inferior dignity.

By presenting his tableau before the collection of the notes and accounts due to the estate, the syndic has given rise to a conflict which perhaps should not exist, for *non constat* but that a sufficient sum may be collected to pay off the law charges, independent of the proceeds of the movables, subject to the appellee's privilege. Be this as it may, the judge has, in our opinion, taken a correct view of the lessor's right on the particular fund to be distributed by the tableau, as presented.

Judgment affirmed.

ABNER WAMACK *v.* CHARLES MORGAN.

APPEAL from the District Court of St. Helena, *Jones*, J.

Muse, for the appellant, submitted the case without argument.

MORPHY, J. The plaintiff is appellant from a decree dismissing a motion he had made to obtain judgment against one William Dennis, as surety of the defendant on a bail bond. The only evidence exhibited by the record in support of this motion, consists of the bail bond itself, and a judgment rendered in the plaintiff's favor against his debtor, on the 4th of May, 1832. No *fieri facias* or *capias ad satisfaciendum* appear to have been issued under this judgment, nor is it even shown that the debtor has ever actually left the state. On the 11th of September following, he made a surrender of his property to his creditors, which the plaintiff unsuccessfully attempted to set aside. See *Morgan* v. *His Creditors*, 7 La., 60. As this case has been submitted to us without argument, we are at a loss to imagine the grounds on which the appellant could expect a reversal of the judgment appealed from.

Judgment affirmed.

JAMES W. FOWLER v. AMELIA SMITH and Husband.

Where it is not certified that the record contains all the evidence adduced on the trial, and the judgment purports to have been rendered on due proof of the plaintiffs' demand, it will be presumed that evidence was offered to satisfy the court, though the record does not otherwise show that any was produced.

The three days required, by art. 312 of the Code of Practice, to elapse before a judgment by default can be made final, must be judicial days.

Where a defendant is cited to answer within a certain number of days, he is entitled to the whole of the last day to file his answer.

APPEAL from the District Court of East Feliciana, *Johnson*, J.

J. R. Thomas, for the plaintiff, submitted the case without argument.

MORPHY, J. The defendant, Amelia Smith, sued on a promissory note, appeals, with her husband, from a judgment by default rendered against her, and assigns as errors apparent on the face of the record:

1. That the judgment was pronounced below without any evidence whatsoever, and without the note, on which the suit was brought, being exhibited to the court.

2. That the legal delay to file an answer, or to have the judgment by default set aside, was not afforded to her; and that the judgment by default was made final, before the lapse of three judicial days.

I. The clerk does not certify that the record contains all the evidence adduced in the case, and the judgment purports to have been rendered on due proof being made of plaintiff's demand. Evidence may have been, and we are bound to believe, was offered to satisfy the court below; but the plaintiff was under no obligation to have it taken down in writing, for the use of his adversary, in case he should wish to appeal. The note sued on is referred to in the petition as annexed to it; and we cannot believe that it was not produced to the judge.

II. It does not appear from the record that three judicial days had elapsed, when the judgment by default was made final. Citation was served on defendant on the 10th of November, 1840, allowing her eleven days to appear and file her answer. It does not appear, on what day the default was entered, for the date is left blank in the

transcript; but as the 22d of November, the earliest day on which judgment could have been taken by default, was a Sunday, it must have been entered on the 23d, and we find it confirmed on the 26th. It is therefore clear, that three days had not intervened between the rendering of the judgment by default and its confirmation; and the days which did intervene, are not even shown by the record to have been judicial days. Code of Practice, arts. 312 and 314. 14 La., 268. If the default was taken on the 21st of November, it was prematurely entered, for the defendant was entitled to the whole of the eleventh day, allowed her by the citation.

It is therefore ordered, that the judgment of the District Court be reversed, and that the case be remanded for further proceeding; the plaintiff and appellee paying the costs in both courts.

HENRY TENNEY v. ELIZABETH W. RUSSELL and others.

A variance as to the name of the defendant between the petition and the note sued on, is immaterial, where the note is attached to the petition.

Where, in an action against the drawer and accommodation endorsers of a bill, there was judgment for plaintiff against the drawer for a part of the amount claimed, but against the plaintiff as to the endorsers, and he appealed from so much of the judgment as was in favor of the latter, without making the drawer a party to the appeal, *held:* that as the drawer is not a party, the amount of the judgment cannot be changed as to her, nor increased as to the endorsers, who must be viewed as her sureties, and cannot be made liable for a larger sum than the principal debtor.

APPEAL from the District Court of West Feliciana, *Johnson*, J.

MORPHY, J. This suit is brought on a note of hand, drawn by Elizabeth W. Russell, to the order of, and endorsed by J. B. Dawson and Peter B. McKelvey, payable at the Bank of Louisiana, at St. Francisville, and bearing ten per cent interest per annum from the 30th of March, 1839. The consideration for which the note was given is expressed on its face, and purports to be a stable erected by the plaintiff, on the lot of the drawer. The defendants, in a joint answer, admit their signatures to the note sued on, but expressly deny that they are bound to pay the same, because, as they

allege, the holder obtained it from the maker by false and fraudulent representations, it having been executed through error. The answer pleads for the maker a want of consideration, and for the endorsers the want of legal notice of the nonpayment of the note by the maker. It further alleges, that no consideration passed between the holder and the endorsers, who put their names on the note only for the accommodation of the maker; and that the work for which it was given was done in so bad and unskilful a manner, that a few weeks after the note was executed, the building began to fall to pieces, and is not worth any thing like the amount claimed for it. The case was tried by a jury; who gave their verdict in favor of the endorsers, and against the drawer, Russell, for $855. After an ineffectual attempt to have this verdict set aside, the plaintiff appealed.

As the defendant, E. W. Russell, has not been made a party to this appeal, the judgment of the court below is to be reviewed only as regards her co-defendants, Dawson, and McKelvey. The verdict and judgment do not show, nor do we perceive, any legal ground on which the endorsers could have been exonerated. The certificate of the justice of the peace, who, in the absence of the notaries of the town of St. Francisville, made the protest, is in legal form. It proves that the notice of non-payment to P. B. McKelvey, was handed to him personally, at his residence in St. Francisville, on the day after the protest; and that, on the same day, a notice of the protest, addressed to J. B. Dawson, was put in the post office of St. Francisville, which is proved to be the nearest to his residence. As to the erasure of the name of *T. Thompson*, in the signature of the drawer, over which that of *T. Russell* was written, it is sufficiently accounted for by the fact that the two names are proved to be in the same hand-writing, to wit, that of the defendant, E. W. Russell. The appellees, moreover, have admitted their signatures as endorsers on this very note, and do not pretend that it has been altered since they endorsed it. The judge correctly admitted the protest and certificate of notice, notwithstanding the variance between the signature of the drawer, as described in the petition, and that set forth in those instruments. In the petition it is stated to be *Elizabeth T. Russell*, while in the protest and notice, it is set forth as being *Elizabeth W. Russell*. The latter,

we understand to be the correct name, but the evidence shows, that from the manner in which the drawer writes the letter in the middle of her name, it is difficult to tell whether it is a *T.* or a *W.* The mistake in the petition was immaterial, as the note sued on was attached to it, and as the defendants had admitted their endorsement on it, they could not complain that the error was corrected in the notice given to them. In relation to the want, or failure of consideration, which is a means of defence common to all the defendants, we have examined the mass of evidence adduced in support of it, and have no reason to be dissatisfied with the finding of the jury. It is unnecessary to notice the plaintiff's bill of exceptions, to the opinion of the judge excluding testimony to prove that he made repairs to the dwelling house of the drawer, which likewise constituted a part of the consideration of the note, and to show that such consideration was sufficient for the note sued on. By failing to make Elizabeth Russell a party to this appeal, the plaintiff has waived or lost the benefit of it, as regards the appellees, who are to be viewed in the light of sureties of the drawer. If the amount of the judgment can no longer be changed so far as she is concerned, it cannot be increased so as to make the sureties liable for a larger sum than the principal debtor. Civ. Code, art. 3006.

It is therefore ordered that the judgment of the District Court be reversed, and that the plaintiff, Henry Tenney, do recover of the defendants, J. B. Dawson, and P. B. McKelvey, *in solido*, the sum of eight hundred and fifty five dollars, with interest thereon, at the rate of ten per cent per annum, from the 30th of March, 1839, until paid, and five dollars, costs of protest, with costs in both courts.

Dalton, for the plaintiff.

Paterson, for the appellees.

Cary Robinson v. His Creditors.

Where one of the creditors of an insolvent, has within the ten days following the appointment of the syndic, opposed his application for the benefit of the laws relative to the voluntary surrender of property, on a charge of fraud, and the debtor, by failing to answer the interrogatories propounded to him by the opponent, has established the charge, the latter will not be allowed to discontinue his opposition, which may be prosecuted by any creditor, though he may not have opposed the surrender within the ten days.

Where an insolvent debtor, who has applied for the benefit of the laws relative to the voluntary surrender of property, has, subsequently to his application, done any act which amounts to a fraud upon his creditors, and which could not, from the time when it was done, have been presented in an opposition filed within the ten days following the appointment of the syndic, he may be opposed after the expiration of the ten days.

Appeal from the District Court of the First District, *Buchanan*, J. The plaintiff, a money broker, having filed his petition praying to be allowed to surrender his property for the benefit of his creditors, the cession was accepted by the court, and a meeting of the creditors fixed for the 18th of April. Joseph Lallande was placed on his schedule as a creditor for $2063 58, and Connolly and Elder for $1569 63. Lallande did not attend the meeting of the creditors; but Thomas S. Elder, of the firm of Connolly and Elder, as attorney in fact for Erskine and Eichelberger, did. The latter declared that the insolvent was indebted to his principals in the sum of $1675, and refused to accept the surrender, on the ground that the applicant had not rendered a true and correct statement of his affairs. A syndic was appointed. On the 28th of April, Lallande filed an opposition to the application of the plaintiff, alleging that the insolvent had committed 'fraudulent acts to the prejudice of his creditors, and of the opponent in particular,' and propounding interrogatories to him, which were ordered to be answered under oath. The opponent further prayed, that the order suspending proceedings against the person and property of the insolvent, might be annulled, and the meeting of creditors and appointment of syndic set aside, and that he might have a judgment for $2005, with interest from judicial demand. On the 14th of May, the proceedings of the creditors were homologated, the appointment of syndic confirmed, and his bond approved. On the 30th of the same month, Elder, as the

agent of Erskine and Eichelberger, filed his opposition to the application of the insolvent, alleging that the latter was indebted to his principals in the sum of $1675, for money obtained from them, through the house of Connolly and Elder, of which the opponent was a member, and charging the insolvent with fraud. To this opposition also, a series of interrogatories were annexed, which were ordered to be answered. On the 12th of June, a rule was taken on the opponent to show cause why the order, requiring the interrogatories to be answered, should not be rescinded, and the opposition dismissed. On the 15th, the order was rescinded, and the opposition dismissed. On the 10th of November, it was ordered that the interrogatories propounded by Lallande should be taken for confessed; and on the 20th of February following, Lallande moved for and obtained permission to discontinue his opposition. On the 23d of the same month, a rule was taken by the counsel of Erskine and Eichelberger, on the insolvent and Lallande, to show cause why Erskine and Eichelberger should not be allowed 'to intervene and carry on the opposition of the latter, and to oppose the insolvent on the grounds set forth in a petition of intervention to be filed on the trial of the rule.' On the 1st of the ensuing month, the rule was discharged, on the ground that the opposition was too late, ten days having elapsed since the meeting of the creditors; and from this decision Erskine and Eichelberger have appealed.

Annexed to the record is a certified copy of the petition of the appellants, which was offered to be filed on the trial of the rule, and rejected by the court. In this petition it is alleged, that the insolvent had given Lallande a draft or drafts for the amount of his debt, on the condition that he would withdraw his opposition, and that it was withdrawn accordingly. This petition also contained other charges of fraud against the insolvent, for acts anterior to his application for the benefit of a surrender. An affidavit, made before a magistrate, by the agent of the petitioners, was annexed to this petition, in which the allegations it contained were stated to be true, to the best of his knowledge and belief.

This case was argued, *ex parte*, by *Eggleston*, for the appellants.

Martin, J. Lallande a creditor of the insolvent, who had filed an opposition to his discharge, having moved and obtained leave to discontinue his opposition, Erskine and Eichelberger, two of the

other creditors, took a rule on the insolvent and Lallande, to show cause, why they, the said Erskine and Eichelberger, should not be allowed to intervene and continue Lallande's opposition, and oppose the insolvent's discharge on various grounds contained in a petition of intervention to be filed on the trial of the rule. The rule was discharged. The applicants took a bill of exceptions to the opinion of the court, refusing them leave to file their petition of intervention, and have appealed. Lallande had filed his opposition on the ground of fraudulent practices on the part of the insolvent, whose conscience he had attempted to probe by interrogatories, and whose refusal to answer, fully established the charge. On the payment of his debt being secured to him by the insolvent *, Lallande agreed to and actually did withdraw his opposition.

The appellants' counsel contends that the consideration which induced Lallande to withdraw his opposition, is one which the law abhors, and that he obtained an illegal preference. *Waith* vs. *Harper*, 3 Johns, 386. That the preference which the insolvent granted to Lallande, if given as alleged, is a new fraud against his other creditors. That the obligations given by a petitioning insolvent to one creditor, to withdraw his opposition, or not to oppose him, are contrary to legal policy, and a fraud upon the other creditors. That they had a right to rely upon Lallande's opposition, and he had no right to negotiate away their rights. *Waite* vs. *Harper*, 2 Johns, 388. *Brice* vs. *Lee et al.*, 4 Ib., 410. *Yeatman* vs. *Chatterton*, 7 Ib., 296. *Wiggin and Wiggin* vs. *Bush*, 12 Ib., 307. *Tuxbury* vs. *Miller*, 19 Ib., 311. *Baker* vs. *Matlock*, 1 Ashmead, 57. *Rogers* vs. *Kingston*, 2 Bingham, 441. *Jackson* vs. *Dawson*, 4 Barn and Ald., 691. *Wills* vs. *Girling*, 5 Moody, 78. The counsel has further contended, that the court erred in rejecting his petition of intervention offered at the trial of the rule, on the ground that it came too late, ten days having expired from the meeting of the creditors, the preference granted to Lallande by the insolvent being a new fraud on the part of the latter, long after the meeting

* This is a mistake. The petition offered to be filed by the attorney in fact of Erskine and Eichelberger, and rejected by the court, *alleges* that the payment of his debt was secured to Lallande *by the insolvent*; but there is no evidence whatever in the record, to establish the allegation. REPORTER.

of the creditors, and such therefore as could not have been presented in the original opposition.

It appears to us that the court erred in permitting Lallande to discontinue his opposition, and refusing to the appellants leave to continue it, and to file their petition of intervention.

It is therefore ordered, that the judgment be reversed, and ours is that the judgment of the District Court ordering the discontinuance of the opposition of Lallande be set aside, and that the above rule, obtained against him and the insolvent, be made absolute; and that the case be remanded for further proceedings, with directions to the judge, to allow the filing of the appellants' petition of intervention. The costs to be paid by the appellee.

Joseph Girard and another v. Their Creditors.

A contract made by the syndic of the creditors of an insolvent with counsel, to pay a certain sum for professional services for the benefit of the estate, is not conclusive upon the creditors, who may oppose the allowance, and reduce the amount, if exorbitant. Such allowance should be in proportion to the number and importance of the suits prosecuted or defended, and to the other professional services rendered; and will form a charge upon the creditors.

Charles B. Lannusse and Charles Gayarré are appellants from a judgment of the District Court of the First District, *Buchanan*, J.

Janin, for the appellants.

D. Seghers, pro se, and for the syndic, argued, that a contract made by the syndic, is obligatory upon the creditors, unless they show that he exceeded his powers. Pothier, Obligations 79. Civil Code, 2990, 2991, 2995.

Bullard, J. The tableau of distribution filed by the syndic in this case, was opposed, so far as it relates to the salary of the bookkeeper, and the sum of $2,500 allowed to D. Seghers, Esq., as counsel, under a contract with the syndic, to attend to all the professional business of the estate surrendered, for that fee. The

opposing creditors are appellants from a judgment overruling their opposition, so far as it concerns the book-keeper, and reducing the fee of the counsel to $2000. In answer to the appeal, the counsel claims a reversal of the judgment in his favor, and that his stipulated fee be reinstated.

The claim of the clerk depends on a question of fact, and there is nothing in the record to satisfy us that the court erred in allowing it.

With regard to the compensation of the counsel, we are clearly of opinion, that the contract of the syndic is not conclusive upon the creditors. His compensation ought to be graduated by the number and importance of the suits he may be called on to prosecute or defend, or his other professional services. The most regular method, we think, would be to present a detailed account, showing the suits in which the counsel may have been called on to assist the syndic, in such a manner as to show to what extent the creditors have been benefited by his professional aid. The record does not satisfy us that the counsel was entitled to what was allowed him by the court below. So far as we are informed of the suits which he defended, we are of opinion that able counsel might have been employed for much less. It is true, one member of the bar testifies that he has read the contract, and looked over the bilan, 'and taking it for granted that the contract was made on the day it purports to have been made, and before any sale was made, he would consider the charge as *not too extravagant*.' He states, on his cross examination, that he knows nothing of the proceedings, or of the services rendered. Another gentleman of the bar, says that he does not think the fee at all extravagant, considering the various proceedings; but that he knows nothing of them, except from the papers. Another witness proves that he brought a suit against the insolvents, before the surrender as we understand him, which was transferred to the District from the Commercial Court, and not being reached, that testimony was taken out of court, and that Mr. Seghers attended five or six evenings in taking evidence. Another gentleman of the bar testifies, that he had two suits against the insolvents, and pushed forward the trial with as much expedition as possible, but met with a good deal of difficulty from Mr. Seghers, though he finally succeeded in getting judgments. This must

have been before the surrender, and not under the contract in question.

Under these circumstances, with very vague evidence as to the importance of the services rendered by the counsel after the surrender, which ought to form a charge upon the creditors, and acting as a jury would be compelled to do in assessing a compensation for them, we have concluded that he is entitled to one thousand dollars.

It is therefore adjudged, that the judgment appealed from, so far as it relates to the counsel fees, be reversed; that the tableau be amended so as to allow him the sum of one thousand dollars, and that in every other respect the judgment be affirmed; and that the tableau, thus amended, be homologated. The costs of the appeal to be borne by the mass.

Daniel Treadwell Walden v. Samuel Jarvis Peters and another.

An act of express ratification to be valid, must mention: *first*, the substance of the obligation; *second*, the motive; *third*, the intention to repair the vice or vices which exist. If there be several vices, mention of one only will not repair the others.

The plaintiff is appellant from a judgment of the District Court of the First District, *Buchanan*, J.

F. B. Conrad, for the appellant.

Micou, for the defendants.

Garland, J. This action was instituted to annul three judgments obtained by the defendants against the plaintiff, on the ground that he was not cited according to law. The plaintiff also obtained an injunction to arrest proceedings on the executions issued on the judgments. The defendants took a rule on the plaintiff to show cause why the injunction should not be dissolved, on the ground that a bond was not given with James W. Breedlove

as security, as required by the order of the court, and on other grounds, which it is not necessary to mention.

When the order granting the injunction was given, the judge ordered a bond with James W. Breedlove as security, to be given for $3,500. At the time Breedlove was not in the city, but his son, who was acting under a general power of attorney, which contained no authority to sign such an instrument, signed the bond as agent of his father; and a day or two afterwards, he says, that he wrote to his father that he had signed the bond in this case and another of the same character, who replied to him, 'you did right to sign the bond for Walden.' The defendants say that this is not an obligation that will legally bind James W. Breedlove, and that consequently no security has been given. We are constrained to say that the objection must be sustained. It is not pretended that the power of attorney gave authority to sign such a bond or bonds; but the plaintiff's counsel contends that the letter of Breedlove to his son, is a ratification of the act. We do not think it a legal ratification. The letter is not addressed to the defendants, and neither it, nor that of Julien P. Breedlove, the son, is in their possession or under their control. The father is the depositary of one letter, and the son of the other, and if an action should be commenced on the bond, neither could be a witness in the case. But admitting that the defendants had possession of J. W. Breedlove's letter to his son, the language he uses is so general and indefinite as not to amount to a ratification of the injunction bond. Only one bond is spoken of in the letter, and whether the bond in this case is meant, or that in the case of Jasper Strong, *post*. p. 459, cannot be understood from the language used. The Civil Code, art. 2252, says, that a ratification is only valid when it contains the substance of the obligation.* Toullier says, three conditions are requisite to the validity of an act of express ratification: *first*, a statement of the substance of the obligation; *second*, mention of the motive; *third*, an intention to repair the vice which exists. If the contract contains several vices, the mention of one of them

*The article cited provides, that such a ratification is only valid, 'when it contains the substance of the obligation, the mention of the motive of the action of rescission, and the intention of supplying the defect on which that action is founded.'

will not repair the others. 8 Toullier, Nos. 495, 499. This court has given the same opinion. 11 Martin, 612.

The judge of the District Court therefore, did not err in dissolving the injunction; but as Breedlove has not appealed, we cannot now interfere with that portion of the judgment, which gives interest and damages against him.

Judgment affirmed.

DANIEL TREADWELL WALDEN *v.* JASPER STRONG.

APPEAL, by the plaintiff, from a judgment of the District Court of the First District, *Buchanan, J.*, dissolving an injunction obtained against the defendant.

F. B. Conrad, for the appellant.

Micou, for the defendant.

GARLAND, J. This suit is brought to annul a judgment obtained by the defendant against the plaintiff, on the ground of their being no legal citation; and an injunction was obtained, which the defendant moved to dissolve on the same grounds as in the case of *Walden* v. *Peters and another*, *supra*, p. 457. The cases are similar in all respects, and we have come to the same conclusion in both.

Judgment affirmed.

JOHN WARD and others *v.* ROBERT C. ARMISTEAD and another.

Where the record contains no statement of facts, nor any thing equivalent thereto, nor exception to the opinion of the judge, nor special verdict, and the appellant relies alone on errors of law apparent on the face of the record, an assignment, stating specially such errors, must be filed within ten days after the record is brought up, or the appeal will be dismissed.

THE defendants are appellants from a judgment of the Commercial Court of New Orleans, *Watts*, J.

T. Slidell, for the plaintiffs.

Schmidt, for the appellants.

MARTIN, J. The certificate of the clerk does not enable us to examine this case on its merits, and the appellants have not prayed for an extension of time to have this defect remedied. They have neglected to file an assignment of errors in writing within the time limited by law, but contend that this was not necessary in the present case. We think that they are mistaken. The Code of Practice, art. 897, provides, that 'the appellant who does not rely, wholly or in part, on a statement of facts, an exception to the judge's opinion, or a special verdict, to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if, within ten days after the record is brought up, he files in the Supreme Court, a written paper, stating specially such errors as he alleges, otherwise his appeal shall be rejected.' The record contains no statement of facts, nor any thing equivalent thereto, nor exception to any opinion of the inferior court, nor special verdict. It is not, therefore, in our power to relieve the appellants' counsel from the consequences of his neglect to file within ten days after the record was brought up, a written paper stating specially the errors he alleges.

Appeal dismissed.

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Succession of Felix de Armas.

One who has no interest in a succession, nor in the question of who shall be appointed to administer it, cannot complain of the want of any of the formalities required by law to precede the appointment of a dative executor.

One who opposes the appointment of a curator of a succession, must allege a better right in himself.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Bullard, J.* The appellee, Joseph Le Carpentier, having been appointed dative testamentary executor of the will of Felix de Armas, deceased, André D. Doriocourt, on the same day, filed his opposition, as it is called, on the ground that he was about to apply for the appointment, when the court, without any public notice, appointed the appellee. He therefore prays that said appointment may be annulled, and that publications may be made according to law. Therefore the dative executor was called on, to show cause why his appointment should not be revoked.

He showed for cause: *First.* That the party taking the rule had alleged no interest of his own, and no right in himself which had been infringed, and that he had consequently no capacity *standi in judicio.* *Second.* That the matters alleged in the rule are insufficient to authorize the judgment prayed for; and that no such proceeding as that now attempted, can be sustained by law, the present not being one of the modes, by which alone final judgments can be changed or affected.

The rule was discharged, and Doriocourt appealed.

We concur with the Court of Probates in the *conclusion*, to which it came. The plaintiff shows no interest in the succession, nor in the question who ought to be appointed to administer it. He has no right therefore to complain of the absence of any formalities, which may be required by law to precede the appointment of dative executors. He was not an applicant, and filed no opposition until after the appointment was made. Even if the opposition had been in time, it is very questionable, whether it could have been listened to. In the case of *Chew et al.* vs. *Flint, Curator*, 7 La.,

* Morphy, J., being interested, did not sit on the trial of this case.

395, we held, that an opponent to the appointment of a curator must allege a better right. Civ. Code, 1112. Code of Prac., 972.

Without enquiring into the reasons, which influenced the judge of the Court of Probates in the present case, we content ourselves with assenting to his conclusion; and his judgment, discharging the rule, is therefore affirmed with costs.

Pepin, for the appellant.

T. Slidell, for the executor.

CHARLES MCMANUS *v.* ELI WEST.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

I. W. Smith, for the plaintiff.

Chinn, for the appellant.

BULLARD, J. This action was commenced by attachment, which was levied upon property of the defendant, West, in the hands of Ward, Moffett, and Co., the garnishees. It appears, from the answer of the garnishees to interrogatories, that they had received from West a lot of two hundred and twenty nine bales of cotton; that before the attachment was levied, they had sold and accounted to West for one hundred and twenty five bales, and that as to the remaining one hundred and four bales, they had received orders from him, at the same time, to hold them subject to the order of Benjamin Odom, the intervenor. The latter has appealed from a judgment of the Commercial Court, dismissing his intervention and claim to the property attached.

The lot of cotton existing in kind, at the time of the seizure, the only question is, whether it had ceased to be the property of West, to whom it originally belonged, and whose creditor had levied upon it. If there had been any change of property, so as to defeat the pursuit of creditors, it must have been in virtue of some valid contract, followed by delivery. The only evidence of any such contract previously to the attachment, consists in the order of West to hold the cotton subject to the order of Odom; and the garnishees, in

answer to the interrogatories, state that they had received orders from Odom to sell the cotton, that it was accordingly sold, and that the proceeds remain subject to his order. This would have been perhaps sufficient evidence of delivery, if a contract of sale of the cotton had been shown. But it is not proved that there had been any sale of the cotton to Odom. The case would have been materially different, if, at the time that West gave orders to hold the proceeds of the cotton for Odom, it had been already sold, and the house of Ward, Moffett, and Co., had become debtors to West for the proceeds. In that case, the orders of West to pay to Odom, would, perhaps, have sufficed.

To the petition of intervention on the part of Odom, it was answered, that the claim set up by him was feigned and fraudulent, and intended to cover the property. This plea authorized the admission in evidence of the declarations of the parties, and threw the burden of proof to show the reality of Odom's title to the cotton, upon him. If the whole deposition referred to in the bill of exceptions, had been rejected, it would not have varied the result. The intervenor has failed to show any right to the cotton attached.

Judgment affirmed.

EBENEZER W. CALEF and another *v.* THE STEAMER BONAPARTE, and owners.

As a general rule the masters of steamers are authorized to purchase necessary supplies for the use of their boats, and to bind the owners to pay for them; but they have no authority to purchase supplies or merchandize for third persons, or to bind the owners therefor.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Potts*, for the plaintiffs. No counsel appeared for the appellant.

GARLAND, J. This action is founded on a due bill for $581 83, given by Charles O. Briggs, captain of the steamer Bonaparte, to the plaintiffs, the consideration of which is stated to be stores fur-

nished the boat. James R. Conner, who is a part owner, for answer, after a general denial and a call for a bill of particulars, denies that any stores were delivered, and especially that Captain Briggs had any authority to purchase supplies, or to make any note or due bill to bind the boat or owners. He further says, that he published a notice in a newspaper in the city of New Orleans, warning all persons that he would not pay any debts of the said boat, unless contracted upon his written order, of which the plaintiffs had knowledge.

An account in detail was filed, which showed the purchase of a number of articles, evidently not intended for the use of the boat, and this is further substantiated by the receipts of the clerk of the boat, but what they amount to we cannot determine with any certainty. The captain proves that all the articles were purchased and delivered, by his order. He says that he examined the account, that it is correct, and that the due bill shows the balance owing. The witness further states, that some of the articles were not for the use of the steamer, but were purchased, by his order, in the name of the boat, for different individuals, which practice, he says, is a common one among all the boats engaged in the lower trade. He further states, that Conner was aware of purchases being made for other persons.

The clerk of the plaintiffs fully proves the sale and delivery of the articles stated in the account, and their value. The notices referred to in the answer, are filed. The first one states, that Conner will not be accountable for any debts of the steamer, unless contracted on his written order; the second, published about a week after, says, that he will not be responsible unless the debts are contracted by the captain or himself. The captain explains the cause of this change. It further appears that after these notices, Conner knew that purchases were made of the plaintiffs, and that he made one or more payments to them, on the order of the captain.

There was a judgment in favor of the plaintiffs, from which the defendant, Conner, appealed.

As a general rule, the masters or commanders of steamers have a right to purchase necessary supplies, and to bind the owners to pay for them; but they have no right to purchase supplies or merchandize for other persons, and thereby bind the owners, or the

boat. In this case, large payments have been made, much more than sufficient to cover the purchases made for other persons, and Conner was aware of the practice of purchasing in this way, otherwise we should not hesitate to remand the case, to ascertain what articles were purchased for other persons, and to declare that Conner was not bound to pay for them. It is to be presumed that the persons for whom the purchases were made, have paid the boat or Conner, and that in this way the goods sold have gone to his benefit.

The second notice of Conner, contains an authority to the captain to contract debts on account of the steamer, and the account shows an amount of necessary supplies furnished for the use of the steamer, largely exceeding the sum claimed.

We have examined the bill of exceptions taken by the defendant on the trial, and think that the judge did not err in admitting the testimony to which objection was made. It goes more to the effect of evidence, than to its admissibility.

Judgment affirmed.

Lewis Trezevant and others v. The Bank of Tennessee.

The Bank of Tennessee, at Nashville, and its branches, form only one corporate body, under the name of the Bank of Tennessee. The branches are not empowered to issue notes, or to sue or be sued; and any property of the Bank will be liable for notes issued under the authority of the principal Bank, though payable at one of the branches.

Costs of protest of a bank note may be recovered, though a notarial demand was unnecessary to entitle plaintiff to interest. The object of the protest is not only to secure interest, but to procure permanent and authentic evidence of a demand at the place of payment. And where different notes of the same institution, held by the same individual, are separately protested, he will be entitled to recover the costs of protesting each note. Having to make a separate demand on each, the notary might well refuse to include them all in a single protest.

The Bank of Tennessee is appellant from a judgment of the Commercial Court, *Watts*, J.

This case was submitted on the points filed, by *Wharton*, for the plaintiffs, and *Preston*, for the appellants.

MORPHY, J. The Bank of Tennessee, a corporation existing in the state of Tennessee, is sued on a number of her notes, of various amounts, forming together the sum of $2078, and for interest thereon, and costs of protest. These notes, which the defendants had made payable at their branch at Somerville, were there presented, and payment having been duly demanded and refused, were each of them protested for non-payment. The answer avers, that the notes sued on purport to be due by the branch of the Bank of Tennessee, established at Somerville, and that, by the charter, the principal bank at Nashville is not liable to pay and take up said notes. It further pleads in compensation and reconvention, a sum of fifteen hundred dollars, with interest from the 12th of November, 1840, which is alleged to be due to the Bank by the plaintiffs, as endorsers on a note of that amount held by the Bank, they having been duly notified of the protest of the same for non-payment by the drawer, Durant Hatch. There was a judgment below in favor of the plaintiffs for $589 24, with interest of six per cent on $383 24, from the 12th of November, 1840, and like interest on $206, from the 21st of November, 1840, till paid, with three hundred and six dollars costs of protest, and the costs of suit.

We have attentively examined the charter of the Bank of Tennessee, which is in evidence, and cannot find in it any sanction of the defence set up in this case. It is true that for certain purposes, and to a certain extent, the branches act independently of the Bank of Tennessee, but nothing that we can see in the powers conferred on them, give them the right of issuing separate notes of their own, or of suing or being sued. They are expressly placed under the control of the principal bank, to whom they are to render monthly statements of their condition, and to whom they are to pay over any dividends they may semi-annually declare, so that the Bank of Tennessee may provide for the payment of the interest on the state bonds, &c. The charter provides further, section 7 of the supplemental bill, 'that the notes to be issued by the Bank of Tennessee for circulation, shall be signed by the President and countersigned by the Cashier of the principal bank, and the same may be made payable at such place or places as shall be deemed

most advisable by the board of directors of the principal bank,' and 'that the notes of the bank or branches shall be received in payment of debts to the principal bank or branches,' &c. The notes sued on here are dated at Nashville, the location of the principal bank; are signed by the President and Cashier of the principal bank; but were made payable at the branch at Somerville. We cannot well understand why the principal bank, which issued these notes, should not be responsible for them. It is said that they belong to the Somerville circulation, and must be paid out of the funds of that branch. We no where find in the charter that the principal bank and its branches are liable only for certain portions of the circulation issued by the corporation; we see, on the contrary, that the bank at Nashville and its branches form only one corporate body, known under the name of the Bank of Tennessee, and having capacity to sue and be sued under that name. The property attached in this case belongs to the Bank of Tennessee, and is, in our opinion, liable for the notes of the principal bank, or for those of any of her branches, issued under her authority.

The counsel for the defendants has next contended, that in as much as by the laws of Tennessee, interest was due from demand of payment, and as it is not required that such demand should be made by a notary, the protests were unnecessary, and the costs of them should not be allowed; and that at all events it was not necessary to make more than one protest, for all the notes. The object of the protest was not solely to secure interest, but also to procure evidence of the demand made at the place designated in them for payment. A notarial protest showing such a demand and refusal, while it was the most convenient course, afforded to the plaintiffs evidence of such a permanent and authentic character that we think they were entitled to it. As to the making of a separate protest for each note, the notary might well and probably would have refused to include all the notes in a single protest, as he had a separate demand to make on each note; and as the fees for protesting a note are proved to be two dollars, he would perhaps have been entitled to a separate charge on each note, even had they been all included in the same instrument of protest. Although these costs are considerable, the plaintiffs, who have paid

them, are, in our opinion, entitled to a reimbursement. The plea in compensation set up by the defendants, has been supported by sufficient evidence.

Judgment affirmed.

THOMAS H. GORMAN v. SIDNEY E. BERGHANS.

The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than the allegations of the wife, or of her counsel.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted on the points filed, by *Eyma*, for the plaintiff, and *Greiner*, for the appellant.

MARTIN, J. The dismissal of this appeal is asked for, on the ground that the appellant is a married woman, and has appealed without the assistance or authority of her husband. A suspensive appeal had been last year obtained, and was dismissed in January last, on the same ground. See p. 230 *ante*. A devolutive appeal has now been taken, but the authority or assistance of the husband does not otherwise appear than by a statement in the petition and bond of appeal, that the appellant is assisted and authorized by her husband. It is correctly urged by the appellee that this assistance and authority must be proved *aliunde*, and otherwise than under the hand of the appellant or her counsel.

Appeal dismissed.

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JAMES H. LEVERICH and another v. DANIEL TREADWELL WALDEN.

Where the petition claims interest only at five per cent, but refers to the note annexed to it which bears interest at ten per cent, and prays for general relief, the error may be corrected by reference to the note, and judgment be given for interest at the latter rate.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

R. M. Carter, for the plaintiffs.

F. B. Conrad, for the appellant.

MARTIN, J. The defendant and appellant assigns as an error apparent on the face of the record, that although interest at five per cent only is claimed in the petition, the judgment allows it at the rate of ten per cent per annum; citing Code of Prac. arts. 156, 157. It is true that interest is claimed in the petition at the rate of five per cent per annum; but there is a prayer for general relief, and a reference in the petition to the note annexed thereto, from which it appears that the defendant bound himself to pay interest at the rate of ten per cent. He cannot, in our opinion, complain that the judgment corrects the error which crept into the petition, by a recurrence to a note annexed thereto, which is in the handwriting of and subscribed by the defendant.

Judgment affirmed.

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Francis H. Hatch v. The City Bank of New Orleans.

An action can only be brought by one having a real and actual interest.

The cause of action must, in all cases, be stated with sufficient certainty, to prevent a repetition, when once investigated and decided.

Where part of the directors of a bank exclude one of their number from the privilege of examining the discount book, to which all the rest have access, on the ground that he is hostile to the institution, and will use the information he may obtain to its injury, a mandamus will lie to enforce the right, which is essential to the discharge of his duties as a director.

To obtain a mandamus the applicant must allege and prove the duty required to be performed, and that he has been injured, or apprehends injury, or that he has been deprived of some legal right.

Under the Code of Practice the powers of the courts of this state as to issuing writs of mandamus, are more extensive than those of the tribunals governed by the common law.

Under art. 831 of the Code of Practice, a mandamus may be issued where the party has other means of relief, if the slowness of the ordinary legal forms is likely to produce great delay and defeat the ends of justice, as well as in cases where there is no other specific remedy.

Mere irregularity, is not enough to obtain an injunction; injury to the applicant, or apprehension of injury, must be shown.

By the charter of the City Bank of New Orleans, the transfer book, and the minutes of the proceedings of the Board of Directors, are the only books required to be kept. The latter is only open to the inspection of the stockholders during one month in each year; as to the former, the charter is silent.

The books of a corporation are evidence of the acts and proceedings of the body, and, with respect to the corporators, are public. They are common evidence, and each individual having a legal interest in them, has a right to inspect, and to use them as evidence of his rights. But a mandamus will not be issued to compel the keeper of such books to allow an inspection, or the taking of copies, unless a clear right be shown, and some just or useful purpose is to be effected.

Appeal from the Commercial Court of New Orleans. A full statement of the case will be found in the following judgment, by *Watts*, J, from which the City Bank has appealed.

This is an application for a mandamus. The petition alleges that the petitioner is a stockholder and director of the City Bank, that for purposes material to the interests of the institution, and of the public, he is desirous of examining the stock ledger of said bank, or the book containing the list of stockholders, and also the transfer book, or book containing the transfer of the stock of the bank; and that he has made application to the President and Board of Direc-

tors to that effect, which has been by them, and still is refused, and all access to those, as well as to the other books of the bank has been and is refused to him.

The petitioner prays, that after due proceedings had, and notice to the President of said Bank, Samuel J. Peters, Esq., it may please the court to order, that access to, and inspection of said books be afforded to him, and for such other relief as the nature of the case may require.

The defendants answer, that even admitting, which they by no means do, all the allegations in the petition, the plaintiff is not entitled to a mandamus, wherefore he says that he is not bound further to answer to the said demand. But should the said exception be overruled, in that case he denies expressly all the allegations in the petition contained.

The respondent further says, that by the charter of the City Bank, the entire management of its affairs, and control of its books and property, are confided to a Board of Directors, who administer the same by a majority, and who have the right of deciding when, by whom, and for what purpose the said books shall be inspected, and that the petitioner has no right in law, to demand the inspection, at his pleasure, of the said books.

The facts admitted, or proved are, that the petitioner is a stockholder and director of the bank; that he applied to the clerk for the books mentioned in the petition, and that he was referred to the President, who said he could not permit them to be examined, except on an order from the Board: that all the books of the bank necessary for any director to ascertain the state of the affairs of the bank, are placed on the discount table on every discount day, to wit, twice a week, and that on these occasions every director has access to such books, and may examine them, but that the stock and transfer book, or list of stockholders, is never laid before the board.

The following extract from the minutes of the proceedings of the Board, is also in evidence:

'City Bank, New Orleans, 19th January, 1842.

'The following resolution was presented to the Board by Mr. Hatch, and seconded by Mr. Albert, viz:

'Resolved, That it is the sense of this Board that the stock ledger

of this institution is open to the inspection of any director of the bank.

'The yeas and neas being called for, it appeared that Messrs. Hatch and Albert voted in the affirmative, and Messrs. Avery, Williams, Hubbard, Turner, McCawley, Lockett, Casey, Hyde, and Peters, voted in the negative; consequently, said resolution was not adopted.'

From the charter of the bank, Acts of 1831, p. 26, we learn that the capital consists of 20,000 shares of stock, at $100 each; that the election of directors is held on the first Monday of March in each year; that no stock can be voted on, which has not been held for ninety days previous to that date; that there is a scale of votes, and that no stockholder can give more than thirty votes; and that each director must be a stockholder of ten shares. The charter further provides, that the transfer of stock shall be made on a transfer book, kept for that purpose; that the Legislature shall at all times have the right of examining into the state of the affairs of the bank; and that any three stockholders may, within one month previous to the election, call for an inspection of the minute book.

From the petition, it will be seen that the petitioner carefully abstains from setting forth, otherwise than in the most general terms, the motives or reasons which induce him to call for the inspection of the stock ledger, stock list, or transfer book. The answer contains a peremptory exception to the petition, on the ground that, admitting all the facts in it, the petitioner is not entitled to a mandamus.

Under the allegations of the petition, and this issue, the petitioner puts himself on his naked legal right, as a stockholder and director, to examine the books specially referred to by him.

In argument, it has been urged by all the defendants' counsel, that the petitioner was bound to set forth special motives and reasons for making this call of inspection; and although the counsel declared that they did not choose to make a special exception of this nature, and were willing to take any sufficient special reason or motive which might be assigned *ore tenus*, yet they have reiterated the principle that the petition ought to be dismissed for want of the assignment of any such reason or motive. The plaintiff's counsel has stated that his reason for not making such an assignment, was,

that it might have been traversed, and lead to an irrelevant issue. I do not concur with him in this, for I am of opinion that any reason or motive which might have been assigned, could not be traversed. I am also of opinion, that in such cases, a party may have naked and abstract rights, for the exercise of which, he is not bound to assign any reason. But even if this were matter for special exception, it has been my practice, since I have been on the bench, always to drive parties to plead any matter of special exception, and not to allow them to take advantage at the trial, of vagueness and generality in the petition. I take it for granted, when a defendant does not call for specifications, that he admits himself to be in possession of full knowledge of the subject matter in controversy, and that he is ready to go to trial, and meet any evidence on the matter which may be brought against him. In the course of ten years experience, I have never found an instance of surprise or of inconvenience, from this mode of proceeding. The peremptory exception is attempted to be sustained on the ground that a party is not entitled to the remedy of a mandamus, when he can assert his rights by any ordinary remedy. This principle is undoubtedly true as a general one, though there may be doubt as to its application in any particular case. The articles 829, 830, and 831, in the Code of Practice, on the subject of the writ of mandamus, are as follows:

'Art. 829. This is an order issued in the name of the state, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act belonging to the place, duty, or quality, with which it is clothed.

'Art. 830. The object of this order, is to prevent a denial of justice, or the consequence of defective police, and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever.

'Art. 831. This order may be issued at the discretion of the judge, even when a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay that the public good, and the administration of justice will suffer from it.'

These articles contain the substance of the rules laid down in the elementary writers on the common law, and, I think, extend the doctrine and application of the writ of mandamus further than is allowed by the common law courts. The counsel for defendants have cited Angel and Ames on Corporations, pp. 408, 429, and 441. 4 Bacon Ab., tit. Mandamus, sec. 7; a case from 22 Eng. Com. Law Rep., p. 40, and the case of *The State* v. *Dunlap*, 5 Martin, 271.

I cannot think that this last case would be held to be law, in our own courts at the present time. The Code of Practice did not then exist, and the judges were very doubtful about their jurisdiction in cases of these unusual writs; and they have even within a very short time wholly changed their views on the subject of the writ of mandamus. The general principle that a mandamus is a high prerogative writ, has been much urged by the senior counsel of the defendant. I admit that it is necessary to preserve the distinction between ordinary actions and these summary remedies, and that they are not to be resorted to as the ordinary modes of proceeding for asserting ordinary rights; and I acted upon this principle when I refused the mandamus in the case of *Bayon* v. *The Mayor of New Orleans et al.*, 9 La., 578. 'Since I have had the honor of a seat on this bench,' says Lord Tenterden, 'I have always thought that the power and authority of the court were limited by the practice of our predecessors; and I have been anxious not to assume, or be a party to assuming, any authority for the exercise of which I could find no precedent: for this reason, when my attention was called to the terms of the present rule, which demands an inspection and liberty to take copies of all records, books, papers, and muniments belonging to this Company, or relating to its affairs, I asked early in the discussion, if there were any precedent for granting a mandamus under such circumstances, my general recollection being that there was not, but that in all the cases where a mandamus had been granted, the application had been limited by some legitimate and particular object, in which the party had an interest.' Even when I find so able a man as Lord Tenterden using such language, it excites a smile to think to what results the system of exclusive reliance on precedents must lead a court in any civilized country, which binds itself strictly by such a rule. If our

fathers made precedents for us, who made precedents for them? The everchanging phases of human affairs, the new, extraordinary, and unexpected developments in the progress of the history of the laws and customs of a people, require that the decisions of the courts should be governed by principles, rather than precedents, which may be good or bad, and an exclusive reliance on which would keep a nation always in a stationary condition. It frequently happens that there are no precedents, because no such case ever occurred before. I prefer the intellectual confidence of the judge who, when it was urged by counsel, that there was no precedent for a most reasonable application, replied that it was time to make one. *Bank of Kentucky* v. *Ashley and Ella, in error*, 2 Peters, 328. Even the English books admit that the remedy of the mandamus was not understood and properly applied until the time of Lord Mansfield, which is only sixty years ago. It appears to me that all these cases must rest on their own particular circumstances. Many of the English cases proceed on the distinction of remedies at law and remedies in chancery; and those referred to and cited in Bacon, &c., were cases of complex rights which required minute investigation of facts, the raising of formal issues for trial, &c.; while I consider that the remedy of a writ of mandamus requires that the right, sought to be enforced, should be clear, simple, and easily recognized. The case of *Rex* v. *The Merchant Taylor's Company*, 22, E. C. R., required a long and tedious investigation, by a suit in chancery. The Company was not a trading company, but a guild of trade and charitable corporation. The refusal of the mandamus by Lord Tenterden was therefore correct, but such refusal should have been placed on the ground of principle—not on the want of precedent. The case of *Rex* v. *The Bank of England* was of a like nature, so far as it required a long and tedious investigation. I confess, also, that I am utterly at a loss to understand what kind of an action the petitioner could bring, to assert the right in question, supposing him entitled to it. The whole matter is fairly and fully brought up in the present proceedings, and no equivalent to the right claimed could be given in any other form of action. In the case from Johnson, where the court refused a mandamus to transfer stock, there was full and adequate remedy in damages for the value of the stock, which was susceptible of precise estimate in money;

but a right of access to and inspection of books is not susceptible of any measure of value, and the only adequate relief is the specific one demanded. The present case is analagous to that of *Lalland e v. The Louisiana State Insurance Company*, in which the Supreme Court expressly decided, that a mandamus was the only proper remedy. 9 La., 326. My own opinion is, that wherever these peculiar remedies lie, they may and ought to be exercised by and in favor of any individual who chooses to incur the expense of asserting a right, common to him with others. In the state of New York the right to provoke the forfeiture of the charter of any corporation, is placed in the hands of any individual who will give security for the costs, and is patriotic enough to take upon himself to assert his own rights and those of his fellow citizens. However much, therefore, english institutions, english precedents, and english principles of law may serve as general landmarks, it is manifest that they must be greatly modified when applied in our country. As I understand these english authorities, I am of opinion that none of them bear any analogy to the present case. The petitioner is asserting a right, which, if he possesses it, can be asserted in no other form of action or mode of proceeding; and, therefore, the peremptory exception, on the ground that he could have a remedy by an ordinary action, is wholly untenable, and is overruled.

We come to the next ground of defence, to wit, that by the charter of the City Bank, the entire management of its affairs, and control of its books and property, are confided to a Board of Directors, who administer the same by a majority, and who have the right of deciding when, and by whom, and for what purpose the said books shall be inspected, and that the petitioner has no right to demand the inspection, at his pleasure, of the said books.

It may undoubtedly be a matter of some delicacy to determine, what part of the books of a corporation is of right subject to the inspection of the corporators. Each case must depend on its own circumstances. In Angel and Ames, on Corp., 408, it is laid down as a general principle, that 'with respect to the members of a corporation, the books of the company are public books; they are common evidence, which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them, has a right to inspect, and to use them as evidence of his rights.'

Again, p. 441, it is said, 'so a corporator may have a mandamus to compel the custos of corporate documents, to allow him an inspection, and copies of them at proper times, and upon proper occasions; he showing clearly a right on his part to such inspection and copies, and a refusal on the part of the custos to allow it.' It is not only as evidence of his rights, that a corporator may claim the production and inspection of the corporation books. I lay down the general principle that if the exercise of his rights and duties requires, or will be aided by the inspection of any of the books of the corporation, the corporator is entitled to such inspection, though for no other purpose than to aid, guide, and assist him in the exercise of those rights and duties. An election of directors of this bank is impending. It is or may be important to the corporator to know who are the stockholders, qualified by the amount of stock held by them, to be elected directors, that he may make a judicious selection of the managers of their common property, and he has a right to this knowledge, in order that he may confer with his co-proprietors, and call for their aid, advice, knowledge, information, and co-operation in the choice of suitable directors. The exercise of this right admits of no delay, otherwise it would be lost. I am of opinion also, that a corporator is entitled to an inspection of the transfer book, in order that he may make enquiry and ascertain if simulated transfers have been made, in order to evade that provision of the charter which limits the number of votes. For these and other purposes connected with his rights and duties as a corporator, he is entitled to an inspection, and he is not to be debarred therefrom by any supposed possibility, that he may abuse the information which he may thus obtain. There is nothing in the charter of this bank which confines the control of its books to the directors, in such a manner as to exclude inspection by the stockholders. It is enough to decide upon the question raised as to the right to inspect these books. The right to inspect books of any particular corporation must depend upon the nature of that corporation, and of the books, the inspection of which is called for. There cannot be the remotest danger to any bank from letting it be known to the corporators, and through them even to the public, who are the stockholders of the bank; and perhaps, if more of their proceedings were made public, there would be more safety for the stockholders and the community. A bank

is a trading company, and every partner of a trading company has the right to the inspection of the common books at reasonable times, and so as not to interfere with the transaction of business; and I am inclined to the opinion, that every stockholder has a right to the inspection of all the books of the bank.

We come now to notice some of the objections urged by the counsel for the defendants. It has been urged that the petitioner has acknowledged that the Board of Directors was the only competent tribunal to decide upon the right claimed by the petitioner, and that the 16th section of the charter having provided for the examination of the minute book upon the demand of three stockholders one month previous to the election, and another section having reserved to the legislature the right of full examination into the affairs of the bank, no stockholder can claim the right of inspection or examination beyond what is there given. These positions are based upon the principle set up in the answer, that the president and directors have the full and exclusive management of the affairs of the bank, so as to exclude every one else, except in the manner pointed out by the statute, from obtaining information, and that the petitioner so considered it when he moved the resolution above set forth. These positions are clearly untenable. Even if it were true that the petitioner had considered, that it was only the directors who had the power to give or refuse the information he asked for, his own opinion of his legal rights is not binding either upon himself, or upon the court, if he should happen to make a mistake in relation to them. The petitioner might with the most perfect propriety ask as a favor, what he might claim as a right. He might wish to see how far the directors would carry their refusal to give him the information he required, and to obtain the formal evidence of such refusal. The sections of the charter confer either additional rights upon the stockholders, or give their rights a definite form, but they do not contain any words which would exclude the corporators from the examination of any books to which they were, on general principles of law, entitled to access, and these statutes are too loosely drawn to be the exclusive measure of legal rights. I incline to the opinion that even the minute book is open to public inspection, and that, if it be necessary for this purpose, a copy of the book, another room, and a clerk should be provided for the use of

the stockholders. Certain books are placed upon the table of the directors when they meet in consultation; and one of the counsel advanced the position, that except when at the board, or acting under the direct authority of the board, a director is no more than any other stockholder. To this doctrine I cannot assent. It is understood that all other institutions have established by-laws, by which directors are excluded from examining books which contain what are called individual accounts. Of the ground of this exclusion I am not aware, and, perhaps, if it were examined, it might be found more plausible than satisfactory; but of this I am satisfied, that, with the exception of such books, a director has, at all seasonable and proper times, a right to examine the books of the bank, and that he is not restricted in his examination to the hours of discount, which are short and too much occupied to allow of the examination to which he is fairly entitled. I have had some experience in investigating the manner in which bank affairs are conducted, having sat for eight weeks, at three different times, on an inquest over the Planter's Bank; and the experience thus acquired, and the recent catastrophe of the Bank of the United States, satisfy me that the greatest danger to these institutions, is when they are taken possession of and retained by a party of directors, and used for their own purposes. The doctrine contended for by the defendants' counsel, would have the effect of making all corporations close corporations; a system which grew up to a frightful extent in England, favored as it was by other depositories of power. The courts had manacled themselves by their decisions, until it required all the power of the omnipotent and reformed parliament of England, to free the nation from the incubus. There are too many corporations, and they have been too often badly managed, for the courts of this country to lean in any other way, than in favor of publicity and free examination. One of the counsel of the defendants has suggested, that if the right claimed by the petitioner be granted, it may be used for the purposes of speculation by the directors and stockholders, who know the exact state of the affairs of the bank. It is obvious that this argument has no weight. A knowledge of the stockholders can generally be obtained at the period of an election, and, at all events, so remote a possibility of abuse, is no reasonable ground for the refusal of a right which may

be used for beneficial purposes. One of the counsel for the defendants sneered at the allegations of the petition, that the information was wanted for purposes material to the interests of the institution and the public, and seemed to consider that the public had no interest in the matter; and that as the management of the institution had been placed by the stockholders in the hands of the present direction, the petitioner had no right to enquire into their mode of management; that it was of no consequence to the public, to use his own language, 'whether the president and his party remained in the control of the bank, or the petitioner and his party acquired it,' and that the only ground which could suggest itself to his mind for the movement of the petitioner was, that an attempt was to be made to turn out the president and his party.

That the public have no interest in the management of these institutions, after the extraordinary scenes which we have witnessed within the last ten years, is a most strange assertion. I have always considered that a fatal blow was given to the principle of the equality of civil and political rights, on which our institutions are founded, when the power of making that, which to all practical intents and purposes, is the money of the country, and which can be used to an indefinite extent, without any real control, was entrusted to private hands; a power which, in fact, is superior in effect and efficacy to that of the executive, the legislative, and the judicial departments of the government. The struggle of the Bank of the United States for existence, which so long convulsed the country, and led to such disastrous consequences, is full proof to the contrary. In that struggle the Bank of the United States was annihilated. I much fear that the struggle of the state banks against the state authorities, may have a similar result. If it be not permitted to use legal and moral means for investigation and reform, or if they prove inefficient, it is much to be feared that less justifiable means will be resorted to. Oppression will make a wise man mad. The refusal of these institutions to fulfil obligations and duties to the community which are so sacred and binding, must result in bad consequences. Injustice leads to retaliation. With regard to the interests of the institution, I do not pretend to say whether it has been well or ill managed, but there is one striking fact, that for five years, with one short interval, the stockholders have re-

ceived no revenue from their property. If the institution be well managed, the public or the stockholders have no interest, whether it be managed by the President and his party, or by the petitioner and his party; but it is a matter of great interest to both, that the rights of the stockholders and the freedom of election should be vindicated, and that persons in temporary power should not be permitted to use any improper or illegal means to retain their power. The President and his party have no more right to the management of the institution than any other stockholders who are qualified to be directors, and they are not to be permitted to make use of their power to deprive any one who may dislike, or oppose them, of any fair means of asserting his rights. The whole argument of the counsel for the defendants, has turned on technical grounds. They have not seen fit to meet the question of the legal and abstract right of the stockholder, at reasonable times, to inspect such books of the bank as will give him information of the persons who are his joint corporators; and I am satisfied, from their zeal and ability, that if the right could have been legally refused on its merits, no argument to that effect would have been omitted. In his essay on parties, Hume has said, that there is a class of men who are devotedly attached to the rights of property. These men are timid and submissive to power. There is another class who regard personal rights above all other rights, even that of life, who are bold and confident, and sometimes reckless and daring. Hampden, Pym, and Vane, in England; Adams, Patrick Henry, and Laurens, in our own country, were of this class. Without a good sprinkling of this class of men, there can be no civil liberty in any country. When we consider the condition of this community—the very large proportion of debtors, who, as Solomon says, are the slaves of their creditors, and that commercial men hold their existence at the nod of the money manufacturing power, we think that the efforts of the petitioner, who belongs to the commercial class, to vindicate by legal and moral means, his rights against the phalanx of power arrayed against him, are worthy of all commendation and approbation. The occasion calls for a strong expression of opinion, and it is no part of my character to withhold it. I do not court responsibility, but when imposed by duty, I do not shrink from it.

In conclusion, I am clearly of opinion that the petitioner, and

every other stockholder is entitled to access to, and inspection of the books called for; and that the President and Directors have acted illegally in refusing such access and inspection.

It is therefore considered that the peremptory exception pleaded in this case be overruled; that a mandamus issue, commanding the President, Directors, and Company, of the City Bank of New Orleans, and all their officers to permit Francis H. Hatch, and any other stockholder of said bank, at all reasonable times and places, to have access to, and inspection of the list of stockholders, the stock ledger and transfer book of the said bank; and that if the petitioner, or any stockholder is hindered or annoyed in the exercise of this right, he will be at liberty to apply to the court for relief by any other process which it has power to grant. It is further ordered, that the City Bank of New Orleans pay the costs of these proceedings.

Eustis, for the plaintiff. 1. A mandamus is the proper and only remedy, for the injury set forth by the complainant. Code of Prac. 789, 830, 831, *et seq.*

2. The writ prayed for is authorized in the case made out, on the general principles of law. *Vide*, opinion of judge Watts.

3. The party is entitled to an immediate hearing and relief. Code of Prac. 831.

Micou and *Grymes*, for the appellants.

The complainant asks a mandamus, to compel the bank to permit him to inspect the stock and other books at his pleasure. Has he such a right as a stockholder?

1st. The charter does not expressly confer the right. It prescribes what book may be exhibited, and how, and by whom its inspection may be demanded. Sec. 16. The same provision, and in the same words, is found in the charters of the Bank of Louisiana, sec. 19; of the Bank of Orleans, sec. 8; and of the State Bank of Louisiana, sec. 9.

2d. The members of a corporation have not, as a matter of course, such a right. The corporation is a distinct being from the members composing it. Civ. Code, art. 426. Its property is not the property of the individual stockholders. They are not tenants in common or partners. Ib., arts. 427, 429. The will of the majority expressed in the form provided by the charter, is the will of the company; and the acts of the majority through their constituted

officers and agents, are the acts of the corporation. Ib., art. 435. Each member of the corporation is bound by its rules, when they are not contrary to law. Ib., art. 436. As a member of the association, he is governed not only by the established rules, but when questions arise, respecting which there is no rule and no law, he is governed by the will of the majority.

3d. The charter of the bank expressly delegates to a Board of Directors, the control and management of its property, affairs, and concerns. Sec. 3. The custody of the books, and the right to determine when and by whom they shall be inspected, is an important part of the trust. If the books are open to every stockholder, the Board of Directors ought not to be responsible for their custody.

4th. In conferring upon the Board the powers embraced in the charter, the law has left it to the discretion of the Board, where the books shall be inspected. This discretion will not be controlled by the courts. Angel and Ames, 447.

5th. The directors, singly, have no greater rights than other members of the company. The charter prescribes that they shall act only by a quorum. The charter does not confer upon individual directors any right, or impose any duty, different from those appertaining to other stockholders. The directors, singly, are not regarded either as officers, or agents of the bank *Louisiana State Bank* v. *Senecal*, 13 La., 525. The directors of a bank are like members of the Legislature, in office only while in session. The right to inspect the books at his pleasure, does not belong either to a member or a director.

6th. The complainant seems to have so considered it. At a session of the Board, and as a member, he offered a resolution, that any director might have access to the books. Here was a subject on which they were competent to decide, submitted to their decision. They have by a large majority declared that they do not consider it expedient to pass the resolution. Will the court sit in appeal upon their decision?

7th. The right of a member of the corporation to demand the inspection of the books, so far as they contain evidence of his individual rights, or so far as any entries contained in them, may affect his private interest, is distinctly admitted. He may compel their production in court, as evidence of any fact at issue. But he cannot

demand that the books shall be always, and without restriction, thrown open to him.

8th. Not a single authority can be adduced in support of the pretensions of the complainant. The cases where the books have been ordered to be produced, are all cases where they were wanted for a distinct and definite purpose. Angel and Ames, pp. 441: and 408, citing 2 Starkie, 734, and both resting on the authority of the Mayor of Southampton, 8 Term Rep. The right of a corporator to inspect the books to see whether the affairs might not be better managed, and even on general allegations of mismanagement, has been expressly denied by the courts. 22 Com. Law Rep., 42.

A mandamus is not the proper remedy. It is a writ borrowed from the english law. It was there a high prerogative writ, introduced to prevent disorder from a failure of justice and a defect of police. Angel and Ames, 429. The applicant must show a complete and specific right. Ib., 444. There must be no reasonable doubt of the existence of the right, or the courts will not attempt to enforce it in this extraordinary manner.

The Code of Practice has not altered the english law; its provisions are almost identical with those of the system from which they were evidently borrowed. Arts. 829, 830, and 840. The Code has specified the cases in which a mandamus will lie to a corporation. It will lie to compel the corporation to receive a member entitled to the privileges of membership, or to restore a member unjustly deprived. It is not pretended that this application comes within either description. The complainant is not deprived of his membership. He is not forbidden to exercise the functions either of a stockholder or of a director. The case of *Lallande* v. *The Commissioners of the Louisiana State Insurance Company*, 9 La., 326, was a case under this article of the Code. The object of the application was, to compel the commissioners to receive the applicant as a member according to the law. The court did not expressly decide the question as to the propriety of the remedy, but admitted the existence of the right, and ordered the cause to be heard.

A mandamus will not lie where the party has another and specific remedy. If he is deprived of his privileges, he may sustain an action for damages. If he thinks himself unjustly pre-

vented from access to the books, he can bring his suit, demanding a decree that the books be submitted to him. Such a decree, if, after hearing both parties, the court should think him entitled to it, would be granted and enforced. The mere circumstance that an election may occur before, according to the forms of law a decision could be had, will not induce the courts to alter their mode of proceeding. Code of Prac. 831. In every case, it may be assumed that it would be highly convenient to the plaintiff to obtain the summary interposition of the courts; but if they were to attempt to meet the convenience of the suitors by altering the forms of proceeding, we would soon have no cases besides summary cases, and no process but a mandamus. A judgment in a suit would establish the right, if it exist, from the moment of the decree until the complainant ceased to be a share holder. 10 Johnson. 2 Barnwell and Ald.

The right demanded is not that of a member, but of a visitor; not of an equal with other members, but of a superior; not for purposes appertaining to private interest or to the duty of a director, but for purposes '*important to the interest of the public and of the institution.*' Blackstone, vol. 1, p. 480, speaking of the power of visitation, says, 'the law has provided proper persons to *visit, inquire into,* and *correct* all irregularities.' In England the King is the founder of a charity, and is its visitor. By what law is the complainant constituted, the visitor to inquire into and correct the irregularities of the City Bank? The charter of the bank makes the Legislature of the state the visitor of this corporation. The court will hardly permit the complainant to assume its functions. That the right claimed is that of a visitor, is apparent. The right to inquire into abuses would be futile, without the right to correct them; and the court will scarcely grant this high writ, merely for the gratification of an idle curiosity. The applicant should at least inform the court of the object of his demand. As he is not recognized as the exclusive guardian of the interests of the public or of the bank, he should explain to the court, how any right of his own as a shareholder or a director has been infringed.

But, admitting for a moment that the complainant has a clear right to inspect the books, will a mandamus lie? The right is

urged upon the ground that the books of the bank are the books of the corporators, each of whom has a right to inspect them. Be it so. The books of a commercial partnership are the property of the partners; each member of the firm is seized and possessed of them, *per my et per tout;* but would this court listen to an application from one partner of a commercial firm, for a mandamus to compel his co-partners to show him the books of the house? He might institute a suit to enforce his rights, and the books would be ordered to be brought in as evidence of them; but to attempt to enforce them by a mandamus, would be ridiculous.

In conclusion, we must notice the form of the decree of the court below. It not only grants the prayer of the complainant, but proceeds to adjudge, before any demand has been made, '*that all other stockholders shall be admitted to the same rights.*' It goes further, and invites the complainant and other stockholders, in case of resistance to the decree, or hinderance in the exercise of the right, to come back to the court, and promises, in advance, that all its powers shall be exerted to enforce the decree.

A court should never presume that its decrees will not be implicitly obeyed. A people accustomed to obey the laws, should not be threatened beforehand with the consequences of anticipated disobedience. The idea that a refusal to obey is possible, ought not to be suggested. It detracts from the dignity of the court. It has an injurious effect upon the public mind. It casts an unwarranted reflection upon the party to the suit, against whom the decree is directed. The judge of the court below was misled by his zeal. He could not suppose that any disobedience or evasion of his decree, was intended by the defendant. He had no right, and no reason to entertain such a supposition. Where then was the necessity of his promulgating to the world, and recording upon the minutes of the court, that the powers of his court would be exerted to enforce its decree? Are not the powers of the court always exerted, to enforce all its decrees? If such judgments pass without notice, we may soon find judges entering of record, that they will volunteer to head a posse comitatus and assist the sheriff in the execution of their decrees. It is due to the supremacy of the law, it is necessary to preserve the decorum of the courts, that such judicial quixotism, should be rebuked; and we trust that

whatever judgment this court may render upon the application, the form of the judgment below will be corrected, and the decree, stripped of its superfluities, will decide simply and purely upon the issue presented by the pleadings.

After this case had been argued, and while under consideration, an act of the Legislature was passed, which was approved on the 24th of February, and ordered to take effect from the time of its publication in the state gazette, which provided:

SEC. 1 That from and after the passage of this act, it shall be lawful for any stockholder or director of any bank, at any time during the business hours of the bank, to examine and take copies of or make lists from the stock ledger, or book containing lists of stockholders, and it shall be the duty of the President and Cashier of every bank, to allow such stockholders or director to make such examination or such lists, and any President, Cashier or other officer of a bank who shall violate the duties imposed by this section, and any director who shall vote for excluding any stockholder or director from the right of examination contemplated by this section, or if such exclusion shall have been already ordered by any Board of Directors, shall not within ten days after the promulgation of this act, unless prevented by illness or unavoidable accident, from attending the meetings of the Board, move and vote for a rescision of such order, or for granting such right, unless such motion should have been already made and said resolution rescinded, shall be liable to criminal prosecution, and on conviction, shall be punished by fine not less than one hundred dollars nor more than one thousand dollars, and by imprisonment not exceeding three months, or both, at the discretion of the court, and shall forever after be incapable of holding the office of director, president, or cashier in any bank.

GARLAND, J.* The petitioner alleges that he is a stockholder and director of the City Bank of New Orleans, a corporation established in the said city. That for purposes material to the interests of the institution, and of the public, he is desirous of examining the

* MORPHY, J., being interested, did not sit on the trial of this case.

stock ledger of said bank, or the book containing the list of stockholders, and the transfer book, or book containing the transfers of the stock. He further states that he has made application to the President and Board of Directors to that effect, which application has been refused, and is still refused by them, and that all access to those, as well as to the other books of the said bank, has been and is refused to him. He therefore prays that after due proceedings had, and notice to the President of said bank, it be ordered that access to, and inspection of, the said books be afforded to him; and he also prays for general relief.

Upon these allegations and prayers, the judge of the Commercial Court issued an order addressed to the City Bank of New Orleans, commanding the President thereof, and all officers and servants of the said corporation to grant access to, and inspection of the stock ledger and transfer book of said bank to the petitioner, or to show cause to the contrary. In obedience to this order, a mandamus was issued, directed to the City Bank, its President, and all its officers, and servants, commanding them to grant access to and inspection of the books mentioned, to the petitioner, or to show cause to the contrary.

The bank, in its corporate name, appeared, and answered:

'That admitting, which the respondents by no means admit, all the allegations in said petition contained, the plaintiff, is not in law entitled to a writ of mandamus, wherefore respondents say that they are not bound to answer to said demand.'

The defendants then say, should the exception be overruled, that they deny all the allegations in the petition. It is further answered, 'that by the charter of the bank, the entire management of its affairs, and the control of its books and property, are confided to a Board of Directors, who administer the same by a majority, and have the right of deciding, when, by whom, and for what purpose, the said books shall be inspected, and that said petitioner has in law no right to demand the inspection at his pleasure of said books.'

For further answer, the respondents say, that by his petition, the complainant is attempting to put in controversy the right of the respondents to control the books of the bank by a majority of the directors, which right exceeds in value the sum of three hundred dollars.

On these pleadings, the parties went to trial. It is admitted that Hatch is a director and stockholder; that he applied to a clerk for the books mentioned in the petition, and was referred to the President, who said that he could not permit them to be examined, unless under an order of the Board of Directors; whereupon, on the 19th of January, 1842, the complainant offered at the Board the following resolution for adoption:

'*Resolved*, That it is the sense of this Board, that the stock ledger of this institution, is open to the inspection of any director of said bank.'

This resolution was rejected, by a vote of nine to two. It was further admitted that all the books of the bank necessary to enable any director to ascertain the state of its affairs, are placed on the table before the directors, on each discount day, viz, twice a week, and that at those periods every director has access to them for the purpose of examination; but that the stock and transfer book, or list of stockholders, is never laid before the Board.

The judge overruled the exception, and ordered a mandamus to be issued, commanding the President, Directors, and Company of the City Bank, and all its officers to permit the complainant, *or any other stockholder* in said bank, at all reasonable times and places, to have access to, and inspection of the list of stockholders, the stock ledger, and transfer book; declaring that if he, or any other stockholder, should be hindered or annoyed in the exercise of this right, he will be at liberty to apply to the court for relief by any other process, which it has power to grant. From this judgment the bank has appealed.

The act of the legislature, of the 3d of March, 1831, constitutes certain individuals, their associates, and successors, a body corporate, by the name of the City Bank of New Orleans, vesting it with all 'the powers, and rights given by law to private corporations.' Books were to be opened for subscription to the stock, under the direction of certain individuals. 'The property, affairs, and concerns of said corporation,' says the act of incorporation, 'shall be managed, and conducted by twelve directors,' elected by the stockholders annually. A book, in which the transfers of stock are to be entered, or registered, is directed to be kept; also, one in which all proceedings of the Board of Directors are to be recorded.

These are the only books mentioned in the charter. Any three stockholders, uniting in a call for the purpose, may within one month preceding the election of directors, examine the minute book; and the legislature, by a committee, or agents duly appointed, may at any time, examine into the affairs and books of said bank, and if necessary, call a meeting of the stockholders, to lay before them the result of the examination. The right of examining one book, is specially given for one month in the year, but that is not a privilege accorded to a single stockholder; at least three, must apply for it at one time. In relation to the transfer book, nothing is said about inspecting it. For their own government, and the conduct of the affairs of the bank, the directors are authorized to make such by-laws and regulations as to them shall seem proper, not inconsistent with the constitution of the United States, of the state, or the laws of either.

In conformity with the charter, the complainant was chosen a director. All the rights and privileges enjoyed by the directors, were enjoyed by him. But he wished to examine books which other directors were not permitted to look into, and it being refused, he endeavored to have a rule, or by-law, adopted, granting the right to all directors, but not to stockholders, of making such examinations. The proposition to make this rule having been rejected, the complainant asks the court, in effect, to establish such a regulation.

The exception taken by the defendants, presents the question, whether the complainant has any cause of action, that is, whether he presents such a claim or right, as can or should be enforced, or states any wrong which may be redressed, or the apprehension of any abuse or injury which can be corrected or prevented. It is therefore necessary to analyze the character of the complaint, and the remedy demanded.

The complainant says, that being a stockholder and director in the bank, he is desirous, for purposes material to the interests of the institution, and of the public, to see the list of stockholders, and the transfer book, both of which have been refused to him; he therefore asks the court to order that he have access to them; whereupon, process, called in legal language extraordinary, is issued; the usual forms of law are disregarded, and a preference given in the trial, over other suitors. The 15th article of the Code of Practice

says, that 'an action can only be brought by one having a real and actual interest, which he pursues.' Whenever that interest arises, an action may be commenced; a clear and concise statement of the nature and object of the demand must, however, be made, as well as of the nature of the title or cause of action; and a prayer, analogous to the nature of the action to which the plaintiff has resorted, must conclude the petition. There must be some certainty in all demands, and they should be so stated, as to prevent a repetition of them, when once investigated and decided. The complainant does not allege in himself any right of property in the books in question. He asserts no personal interest in the examination he desires to make, further than as his own interests may be connected with that of the bank, and the public. He does not inform us of the extent of those interests, nor of their character. He does not allege that the interests of the Bank, or the public, are endangered, nor that he apprehends that his own will suffer in any manner; nor is there any complaint that he is deprived of any right or privilege, enjoyed by any other director or stockholder. No mismanagement of the affairs entrusted to the Board of Directors is charged or insinuated, nor is any attempt made to show a single act calculated to affect the public interest; and I should have been entirely ignorant of the object and purpose of this demand, if it had not been admitted by the counsel for the complainant, in the argument, that the main purpose was, to enable his client to operate with more success in an approaching election for directors of the bank. I am not, generally, disposed to be technical. As a matter of propriety among those interested in the bank, I think that the list of stockholders should be exhibited, whenever requested for any proper purpose, and if withheld to the injury of any one interested, I should, upon a proper representation, extend all the relief which the law affords; but I cannot, on the allegations of this petition, consent to prostitute the process of the court, to effect the objects avowed.

Suppose the complainant had alleged, that it was material to the interests of the bank and of the public, that he should examine the vaults of the institution, and the accounts of individuals, and that permission had been refused, and he had applied for a mandamus to obtain access for the purpose. Upon such an allegation, the merest novice in the profession would pronounce the application

one approaching to absurdity; yet an ingenious mind could suggest many plausible arguments connected with the security of the funds in the vaults, and of the debts owing the institution, to prove that both should be permitted.

The writ of mandamus, as introduced into our jurisprudence, seems to have been derived principally from the common law. Bacon says, that it is 'a writ commanding the execution of an act, where otherwise justice would be obstructed, or the king's charter neglected, issuing regularly, only in cases relating to the public and the government; and is therefore termed a prerogative writ.' 4 Bacon Ab., 497. It will not generally be issued in a case, where a party has another legal remedy. Douglas, 526. In the case of *Rex* v. *The Bank of England*, an application was made for a mandamus, to compel the production of an account of the income and profits, to enable the next General Court, or meeting of stockholders, to consider of the state and condition of the bank, and to declare a dividend. Special facts were also set forth, and a direct violation of the by-laws charged. It was also made to appear that the GeneralCourt of the proprietors, were bound to make a dividend semi-annually. The complainant also showed, that he had applied to the General Court for an order to compel the directors to produce the accounts, and that they had refused to do so. The court of King's Bench unanimously refused the rule. Chief Justice Abbott said, 'no instance has been cited, in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent.' Justice Bailey said, 'the court never grants this writ, except for public purposes, and to compel the performance of public duties. There is no instance in which the court have granted a mandamus to a trading corporation.' 2 Barnwell and Ald., 620.

The case of *Rex* v. *The Master and Wardens of the Merchant Tailors' Co.*, 2 Barnewall and Adolphus, 115, and 22 Engl. Com. LawRep.,40, is of more recent origin. A number of the corporators, who were dissatisfied with the management of the company, appointed a committee of their body, to examine into its affairs. They called upon the clerk, who refused to exhibit the books and papers of the company. Whereupon the corporation and the clerk were called upon, to show cause why a mandamus should not be granted, commanding

them to permit those individuals, their agents, and attorney, at all seasonable times, to inspect and take copies of all records, books, papers, and muniments belonging to the company, or relating to the affairs thereof. Affidavits alleging a *belief* of mis-appropriation of funds, violations of the charter, and other abuses, were presented, and the relators closed their application by saying, that they had no other wish, in desiring the inspection of said charters, by-laws, and other documents, than to see, on behalf of a body of the members by whom they were authorized to act, how their joint funds were disbursed, and that the legal rights and privileges of the members of the company should be enjoyed by them, agreeably to their charters. Many objections were made to making this rule absolute; and, among others, the clerk of the company stated on oath, that he was informed, and believed, that the demand was prosecuted by a small minority of the members; that he was also informed, and believed, from the course pursued, that the application was not made *bona fide*, but in order to furnish the parties indirectly with materials, if possible, for disturbing the established constitution of the fraternity, and impugning the election of the governing officers. The court decided, that they would not, on the application of members of a corporate body, grant a mandamus to inspect the documents of the corporation, unless it should be shown that such inspection was necessary, with reference to some specific dispute or question pending, in which the parties applying are interested; and that the inspection will then be granted, only to such extent as may be necessary for the particular occasion. But that where members of a corporation, merely alleging grounds on which they believe that its affairs are improperly conducted, and that the officers have been unduly chosen, and complaining of mis-government in some particular instances, not affecting the parties themselves, nor any matter then in dispute, apply for a mandamus, to allow them to inspect, and take copies of all records, books, and muniments in the possession of the officers, belonging to the company, or relating to its affairs, the rule will be discharged. Littledale, justice, in expressing his concurrence with chief justice Tenterden, said, 'the master and wardens who have the care of the documents in question, are bound to produce them, if a proper occasion is made out, in a matter affecting the members of the corporation. But I think the mem-

bers have no right, on speculative grounds, to call for an examination of the books and muniments, in order to see if, by possibility, the company's affairs may be better administered, than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged; and then the question will arise, whether or not the court will grant a mandamus.' Taunton, J., said, 'if the members of every corporation had a right, on mere speculative grounds, to call upon the governing part of the body, for an inspection of all records, books, and muniments belonging to it, the consequences would be endless confusion and inconvenience. It is necessary that there should be some particular matter in dispute between the members or between the corporation and individuals in it; there must be some controversy, some specific purpose, in respect of which the examination becomes necessary.' He proceeds further to say, that if in making the application, any purpose could have been pointed out, the parties showing that they had an interest in the matter in question, the rule might have been granted, and that the decision then made, would not prevent a remedy in future, if any grievance should be stated and shown. Patteson, J., said, the rule must be discharged, from the generality of its terms; but he was far from saying, that there may not be instances, in which a corporator may apply for a mandamus to inspect documents of the kind mentioned, 'if he can show a specific ground of application, and that the granting of it is necessary to prevent his suffering injury, or to enable him to perform his duties.' But some tangible object must be stated.

This case is similar, in many of its features, to the one under consideration; and it appears to me, there is much good sense, as well as law, in the opinions of the judges. The judge of the Commercial Court says, that the decision is correct, but that it 'should have been placed on the ground of principle, not on the want of precedent.' Still he decides in contravention to it, principally, as I understand him, because the case required a long and tedious investigation, and the company was not a trading one, but a guild of trade and charitable corporation; and the one now before us presents a right, clear, simple, and easily recognized.

If a case be decided correctly, it is not material whether principle or precedent influences the court that makes the decision; but

I know of no principle or precedent, that entitles one party to a remedy when his case is simple and easily decided, and deprives another of it, because the investigation of the right may be long and tedious. But the judge of the Commercial Court is entirely mistaken, in supposing that the case of *Rex* v. *The Merchant Tailors' Company* was decided on the grounds which he states, as a reference to the case and to the extracts which I have made from the opinions of the judges, will show.

The Supreme Court of the United States seem to have restricted the cases, in which a mandamus may issue, as much or more than the english tribunals. In the case of *Marbury* v. *Madison*, 1 Cranch, 137, it was held, that to render a mandamus the proper remedy, the officer, to whom it is directed, must be one, to whom, on legal principles, such a writ can be directed: and the person applying for it, must be without any other specific and legal remedy. So in a case against the Post Master General, it is said, that the right claimed must be just, and established by positive law; the duty, required to be performed, clear and specific; and no other adequate remedy exist. 12 Peters, 524.

In New York, the principles which govern the english courts, have been acted on; and a mandamus will not be allowed where the party has an adequate remedy at law. 10 Johnson, 495. In 10 Wendell, 396, the court said, 'the proposition is universally true, that the writ of mandamus will not lie in any case, where another legal remedy exists, and it is used only to prevent a failure of justice.' See also, 1 Cowen, 502. 2 Ib., 444. In 2 Cowen, 479, the court said, this writ should be exercised very sparingly, only in extreme cases, and where the right is clear. In 12 Wendell, 183, is a case, where a portion of the directors of a bank passed a resolution excluding one of their number from an examination of the di count book, to which all the rest had access, on the ground that he was hostile to the institution, and would use the information to its injury. The court very properly held, that a mandamus would lie, and that it was the proper remedy, as the party was excluded from a portion of the privileges to which each director was entitled, and enjoyed by all except the complainant; and further, that it was proper he should examine the book, to enable him to

perform his duties as a director, and to inform himself of what his co-directors had been doing in his absence.

If such a case, as the last mentioned, were presented, I should not hesitate to issue a mandamus.

In many other cases in our sister states, the principle is asserted, that a mandamus will in general only issue, when a party has a right to have a thing done, and has no other specific means of compelling its performance. There must therefore be a right without an adequate remedy, which right ought to be complete and perfect, and it should be shown, that a refusal, or great delay would cause injury to the relator or complainant. 1 Wendell, 318. 2 Cowen, 444. 2 Binney, 362. 3 Ib., 275. 5 Ib., 87.

The Code of Practice, article 789, says, that 'courts of justice may, in certain cases hereafter provided, direct orders to individuals or corporations, to compel them to perform certain duties prescribed for them by law, or to prevent them from usurping powers, which do not belong to them.' Let us now see, what are the certain cases, in which the writ of mandamus may be issued to corporations. It may, by the 829th article, be issued to a corporation 'directing it to perform some certain act, belonging to the place, duty, or quality, with which it is clothed;' and article 835 says, that it may be directed to such corporations, 'to compel them to make elections, and perform the other duties required by their charters.' Now what are the duties required by the charter of the City Bank. To enumerate them, would require a repetition of the charter; but after a most minute examination, I cannot find that the bank is required, as before stated, to keep but two books, viz., the transfer book, and the minutes of the proceedings of the Board of Directors. The latter is only open to the inspection of the stockholders for one month in the year, and about the exhibition of the former, the charter is silent. Its production, as well as that of the other books, kept in conformity to the by-laws, is therefore to be regulated by general principles.

I do not agree with the counsel for the defendants, that the Code of Practice has restrained the powers of the courts of this state in issuing this writ, more than the common law does. On the contrary, it seems to me that extensive powers are given; so much so, that great discretion should be used in exercising them. It may be

issued in a case, where a party has other means of relief, if the slowness of ordinary legal forms is likely to produce great delay, and defeat the ends of justice, as well as in cases, where there is no other specific remedy. Code of Prac., arts. 830, 831. It may be issued, to compel a corporation to perform any specific duty required by its charter. Code of Prac., art. 835. Therefore when an application is made for the writ, the duty required to be executed or performed, must be stated, that the court may see whether it is required or authorized by the charter, or necessarily results from it; and it must be stated, that the party has been injured, or apprehends injury, or has been deprived of some legal right.

This view of the case is in accordance with our established practice and decisions. 6 La., 77. In 2 La., 63, is a case, where two executions were issued on a judgment at the same time, one being sent to one parish, and one to another. An injunction was obtained, and this court dissolved it, on the ground that no damage had been shown, as one execution only was proved to have been levied. The present presiding judge, in pronouncing the opinion of the court, said, 'it is not enough to obtain an injunction to show irregularity; injury to the applicant, or apprehension of it, can alone authorize a resort to this extraordinary relief.' In 14 La., 280, the same principle was re-iterated. The court said, 'it is not enough to obtain an injunction, to show an abstract irregularity. Injury to the applicant, or at least some apprehension of it, can alone justify a resort to this extraordinary remedy.' Here is the same principle laid down, in almost the same words. If it be true, and I think it is, that injury, or the apprehension of it, is necessary to be alleged and shown, to sustain an application for an injunction, *a fortiori* something of the same kind should be made to appear, to obtain the still more extraordinary process of mandamus.

The judge of the Commercial Court, in his opinion, and the counsel for the plaintiff in the argument, rely strongly upon the case of *Lallande* v. *The Directors of the Louisiana State Insurance Company*, 9 La., 326. That case is very different from this, and goes strongly to sustain the ground I assume. The petition in that case charged fraud, and a violation of the charter, for the purpose of depriving the petitioner of his legal rights, whereby he sustained

serious injury. These allegations were sustained, and the court properly ordered a mandamus to be issued.

The judge *a quo* says, that it is not necessary to make any assignment of motive or reasons, because a party has, in such a case as this, naked and abstract rights, for the exercise of which he is not bound to assign any reason. That the plaintiff may have naked and abstract rights, is a matter I shall not now controvert; and so long as he can exercise them himself, I shall not deny his right to do so, without the assignment of any motive or reason. But when he appeals to the tribunals of justice to assist him, then his rights must be investigated, and sufficient reasons shown, before process will be awarded. I have looked into a good many treatises on jurisprudence, and examined the statutory provisions of our state, without being able to ascertain, what those naked and abstract rights are, which the plaintiff can exercise of his own volition. If they be natural or imperfect rights, then they will stand in the same category with natural or imperfect obligations, and create no right of action. If these abstract rights be civil, they can only be enforced as other legal obligations.

It has been urged, that the books of a corporation are evidence of the acts and proceedings of the corporate body, and, with respect to the corporators, are public; that they are common evidence, and that each individual, possessing a legal interest in them, has a right to inspect and use them as evidence of his rights. Angel on Corporations, 406, 408. I have no doubt of the correctness of this doctrine; but the author who asserts it, also says, pp. 428-441, that a mandamus will not be issued to compel the custos of corporate documents, to allow an inspection, or copies to be taken, unless a clear right is shown, and some just or useful purpose is to be effected. No just or useful object has been alleged, or proved in this case. It is not shown, in what way the interests of the bank, or the public are to be promoted by the complainant's inspecting the books mentioned, so that we can judge of their sufficiency.

In coming to a conclusion, I have not looked beyond the record, nor assumed any thing as a fact, which does not appear. I have stated all the pleadings and evidence in detail. Upon them my opinion is formed, and I do not feel authorized to go further, either for reasons, or to impute motives, nor can I speculate upon the po-

litical considerations and arguments, which constitute so large a portion of the opinion of the inferior tribunal.

It has been said, that it is important that the complainant should examine the list of stockholders, that he may know, who are his associates in the corporation, and who are authorized to vote for directors, or qualified to act as such. He does not allege, that he is unacquainted with the stockholders of the bank, nor that his own interests, those of the institution, or of the public, would be advanced by his knowing the stockholders, and ascertaining who are qualified to vote, or to act as directors. It is fair to presume that the complainant, who is a director, knows his constituents; and the judge of the Commercial Court tells us, that 'a knowledge of the stockholders can generally be obtained at the period of an election.' If this be so, the complainant can sustain no serious injury by waiting until that time, as he cannot exercise his right as a voter before.

It also seems to me, that the actual rights of the complainant to the estate and property of the corporation, are not definitely understood. Article 427 of the Code says, that the estate and rights of a corporation belong entirely to the body, and that no individual corporator can dispose of any of them, and that they are very different from a thing, which is common to several individuals. If therefore the claims of the complainant were recognized to the extent set up, it might deprive the property of the character given to it by law, and make it common.

I am therefore of opinion, that the judgment of the Commercial Court should be reversed, and the rule be discharged with costs.

Bullard, J. I have carefully considered the opinion prepared and just pronounced by judge Garland, and concur with him. It appears to me that the complainant has not shown himself entitled to the extraordinary remedy which he seeks, even admitting his right to have access at all reasonable times to the stock book or ledger.

Martin, J. This is the first melancholy instance in which this court has pronounced a judgment, in which the majority of its members do not concur; and I fervently pray that it may be the last. It is my misfortune to dissent from the opinion of two of my colleagues, and as this circumstance renders it extremely probable that I labor under an error, I will detail more minutely than I am

accustomed to do, the considerations which have led me to the conclusion at which I have arrived, that it may at least appear I have given to the case all the attention of which I am capable.

The bank is appellant from a judgment making absolute a rule to show cause why a mandamus should not be issued, commanding the President, Directors and Company, and all their officers, to permit the plaintiff and any other stockholder of said bank, at all reasonable times and places, to have access to, and inspection of the list of stockholders, the stock ledger, and transfer book.

The facts of the case are these: The legislature, by a provision in the charter, has directed the annual election of directors to be holden on the first Mondays of March. Towards the middle of January last, the appellee, a director, and consequently a stockholder, applied to the clerk in whose possession were the list of stockholders, transfer book, and stock ledger, for the inspection of the said list and books, and was referred to the President, who said that he could not permit the inspection, unless under an order of the Board; whereupon, at its next meeting, the appellee proposed a resolution, declaring the sense of the Board to be, 'that the stock ledger of this institution is open to the inspection of any director.' The resolution was rejected, having been supported by the appellee and one other director only. On this, the rule to show cause was obtained. The appellants showed for cause, that, admitting the allegations of the plaintiff to be true, which they denied, he was not entitled to the mandamus, and they were not bound to answer; adding, that if the exception should be overruled, they denied the allegations of, and the right claimed by, the relator.

I have considered the case under three points of view.

1st. Whether a director has a right of access to, and inspection of, the stock list, stock ledger, and transfer book?

2d. If this right exist and be denied, or obstructed, whether a mandamus be the proper remedy?

3d. Whether the petition contains such matters and allegations as will enable the court to extend its aid, or whether it be so deficient in these respects that the application should be dismissed?

I. During the short period which has intervened between the judgment appealed from and ours, the legislature has passed a law entitled 'An act supplementary to an act, entitled an act to prevent

further violations of law by the banks,' which doubles my task in the examination of the first proposition, because it will be important to see what the law was when the judge *a quo* pronounced his opinion, and what it is now; for where the law is changed after the rendering of a judgment, but before the action of the appellate court thereon, its fate in this court must be determined by the new law. *State* v. *Johnson et al.* 12 La. 547. *Atchafalaya Bank* v. *Dawson*, 13 Ib. 497. I am to examine the case under both laws, because the relief under the last act of the legislature, although more extensive than that under the former, as to certain particulars, is less so with regard to others.

The charter requires that the directors shall possess certain qualifications, to wit: that they shall own a definite number of shares, and be citizens of this state; they must besides have holden the required number of shares, during a stated period anterior to the election. The votes of the electors or stockholders, are graduated by a scale according to the number of shares owned by each of them, during a period, fixed by the charter, previous to the election. Every director and stockholder has an unquestionble right to the inspection of the list of stockholders, transfer book, and stock ledger, because such inspection is necessary for the protection of his rights, and to aid him in the discharge of his duties; amongst the most important of which, is the choice of proper persons as directors. The electors have no other means of knowing the persons eligible or entitled to vote, and the number of votes each is qualified to give, but by a recourse to the books called for by the appellee. It is important that he should know who are his co-corporators, in order to consult and deliberate with them on the formation of a proper ticket, and to combine his efforts with theirs for its support.

The governor nominates, and, with the consent of the senate, appoints, six of the directors of the Bank of Louisiana, each of whom must be the owner of thirty shares of the stock. The same number of directors of the Citizens' Bank, are appointed by the joint ballot of both houses of the legislature. There can be no doubt but that the governor or the legislature may require the inspection of the list of stockholders, transfer book, and stock ledger of those banks, in order to acquire the information essential

to a proper selection. The stock list is a balance sheet from the stock ledger; the transfer book exhibits the period of each respective transfer; and the stock ledger contains an account of the changes of the stock of each corporator. It is difficult to conceive for whose use these books are kept, if the directors and stockholders are not permitted to examine them. Every individual stockholder has the same right of inspection as the governor or legislature, as he has the same duty to perform.

The first judge, in my opinion, did not err in coming to the conclusion under the law, as it then stood, that a director and stockholder of a bank, had a right of access to and inspection of the stock list, stock ledger, and transfer book. The recent act of the legislature has placed this right beyond any possible doubt. It provides 'that it shall be the duty of the presidents and cashiers of banks to exhibit the stock list to the stockholders at any time during business hours, and their refusal is made a penal offence, and a disqualification of those who refuse to act in those capacities.' I see nothing in this law which impinges on the rights or charters of these corporations, and look upon it as one of those general rules or regulations relative to this, or any other class of corporations, which may be enacted, altered, or amended at the pleasure of the legislature. This act strengthens the claim of the plaintiff on the first proposition.

II. The second is, whether, when the right of the plaintiff is proved, and the exercise of it denied or obstructed, he may seek relief by a writ of mandamus? This writ, or the order of a court directed to a corporation, officer, or individual, to enforce the performance of a given act, is common to the jurisprudence of every civilized nation, ancient or modern. The courts of this state are not, so far as my knowledge goes, authorized or restrained in the use of it by any principle of the common law of England, by any act of the British Parliament, or by any statute or decision of the courts of any other state in the Union. They received it, on the establishment of a government under the authority of the United States, from the jurisprudence of Spain, which has since been explained by statutory provisions, and the decisions of this court. The Code of Practice, art. 820, gives us the definition of this writ. 'It is an order issued in the name of the state, by a tribunal of

competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act belonging to the place, duty, or quality with which it is clothed.' In article 830, the Code states, that 'the object of this order is to prevent a denial of justice, or the consequence of defective police; and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse, of any nature whatever.' It however may be issued at the discretion of the judge, even where a party has other means of relief, if the slowness of the ordinary legal forms is likely to produce such a delay, that the public good and the administration of justice will suffer from it. Art. 831. It may be directed to all corporations established by law. Art. 835.

1st. To compel them to make elections, and perform the other duties required by their charter.

2d. To compel them to receive, or restore to their functions, such of their members as they shall have refused to receive although legally chosen, or whom they shall have removed without sufficient cause.

The mode of applying for this writ is pointed out in art. 840. 'The party wishing to obtain an order, in any of the cases mentioned in this paragraph, must apply to any competent tribunal, by petition, stating the nature of his right, or of the injury he sustains, or of the denial of justice which he experiences, and shall make oath of the truth of the facts thus alleged.'

The appellee was entitled to a mandamus, under art. 830 of the Code. His object was to remedy a denial of justice, and the consequence of a defective police. The appellants' counsel has contended that the mandamus ought to be refused, because his case was one in which the law has assigned another remedy, to wit, an action in damages. There is not any difference, in my opinion, between a case in which no remedy is provided, and that in which the remedy is absolutely useless or extremely inadequate. The right claimed is of such a nature, that to be of any value, it must be promptly enforced. It is not susceptible of any, but the most capricious measure of damages. The slowness of legal forms, if any other remedy than the writ of mandamus were resorted to, is

such, that the public good would suffer from the delay. The provisions of our law, in this respect, are in accordance with those of the common law, which the counsel for the appellants has invoked. It is laid down by Lord Mansfield, that in order to exclude the writ of mandamus, remedy by other means must be adequate, or must afford specific, or what in the case is equivalent to specific relief. *Rex* v. *The Bank of England*, Doug., 526. Damages cannot be said to be specific relief, for the refusal of leave to inspect books. The sentiments of his lordship were echoed on this side of the Atlantic, by Chief Justice Savage, of New York, in the case of *The People* v. *Throop*, 12 Wendell, 183. This gentleman there says, 'it must be conceded that if the relator has a right to the inspection of the books of the bank, a mandamus is the appropriate, and the only remedy at law. The cases cited by counsel show, that in case of removal, or suspension from corporate rights, a mandamus is the proper remedy. No action at law lies in such a case, under its present circumstances. Whether an action might not be maintained in case actual individual damage should be the consequence of the conduct of the defendant, and his co-directors, is a question not presented; and if such an action would lie, that would be no objection to a mandamus, in the present state of the case. If there is a right on the part of the relator to examine the books, either with reference to his own safety, or with a view to the proper execution of the trust reposed in him by the stockholders, then this is the remedy, and the only remedy in a court of law.' In most of the cases, cited at the bar, in which the mandamus was refused, the application for the writ was preliminary to ulterior proceedings. Those proceedings must have been in chancery, or on a separate trial of a suit at law, and in the course of them the chancellor could have ordered the production of the books. The inspection was wanted with a view to reform the course of management of the directors of the institution, and consequently involved a complicated, minute, and tedious investigation, which it was impossible to carry on, as a summary proceeding, in a court of law. The right claimed by the appellee is distinct and specific, and requires an investigation only of two facts, to wit, whether he be a stockholder, and whether the right be denied; facts which involve no tedious investigations. On authority, therefore, as well as on principle, I cannot imagine a

case in which the remedy of a mandamus is more appropriate, and I would say exclusively so, than the present one; and I cannot think it any *prostitution* of this remedy to grant it, when so apposite to the case of one of the people, whose prerogative it is to demand it.

III. We come now to the third point of view under which this case is to be considered, to wit, whether the petition contains sufficient matter and allegations for the court to act upon, or whether the exception of the defendants was properly overruled? On this point, the Code of Practice is, for me, a sufficient guide. It requires that the petition should contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded. It must end by conclusions analogous to the nature of the action to which the plaintiff has resorted. Art. 172, secs. 3, and 5. This is the rule in ordinary cases. In that of the writ of mandamus, the Code has however made a distinct, and special provision, in art. 840, already cited in the examination of the second proposition. The party must state, 'the nature of his right, or of the injury he sustains, or of the denial of justice which he experiences.' If these provisions of our Code have been complied with, I cannot comprehend how the counsel for the appellants expect to sustain their exception to the sufficiency of the plaintiff's application, on the ground that in some english cases, the courts of that country have required, in their language, something more tangible. The petition states that, 'the plaintiff is a director and stockholder; that for purposes material to the interests of the institution and of the public, he is desirous of examining the stock ledger, or book containing the list of stockholders, and also the transfer book, and that he has made application to the President and Board of Directors therefor, which has been, and still is refused to him; and all access to those, as well as to the other books of the bank, has been, and still is denied him.'

In general cases, the Code requires a clear and concise statement of the object of the demand. I find in the petition, that purposes material to the interests of the institution, and of the public, are the object or motive of the demand. A statement of the nature of the title of the applicant is next required; and this results from the station which the petitioner alleges he occupies, and which legally

gives him a right to the inspection he seeks. The cause of action required to be stated, is the refusal of the officers of the bank to suffer the exercise of the plaintiff's right. The requisites of the Code in petitions in ordinary actions, are therefore strictly complied with. In petitions for a mandamus, the party is to state 'the nature of his right, or of the injury he sustains, or of the denial of justice which he experiences.' It would have been sufficient to have stated either of these three requisites; for the Code enumerates them disjunctively. I find them, however, all stated. The right is asserted; the injury, is the obstruction of its exercise, or in other words, a denial of justice.

The exception is, that 'admitting all the allegations in the petition, the party is not entitled to a mandamus.' This exception is of the most general nature, and does not call for or point out the want of any specific allegations. Under an exception of this kind, every intendment is to be made, and every inference assumed which can fairly be drawn. The petitioner alleged that he desired the inspection, for purposes material to the interests of the institution, and of the public. This petition was filed on the 19th day of January, and the record shows that the election of directors was to have taken place on the 7th of March following. It certainly is a purpose of material, nay, of vital importance to the public and to the institution, that there should be a well selected Board of Directors, which is most likely to be obtained by a free and open election. It may, therefore, be well intended, that this was one of the purposes for which he desired such inspection. In the case of *The People* v. *Throop*, already cited, the affidavit, which, in the state of New York, is, like the petition in this, the basis on which the writ of mandamus rests, stated only that the relator was a director of the bank, and that the cashier had refused to permit him to inspect and examine the discount book; and no objection was made to the affidavit in that very contested case; but the bank relied on an offer of proof that the relator wanted the writ merely for purposes hostile to the institution. The court disregarded this, and looked only to the naked right of the relator. As a general rule, no man is bound to give a reason for demanding his right. If a suitor demand a tract of land, a house, a horse, or a sum of money, it is not necessary for him to say that he wants the land to cultivate, the

house to inhabit, or rent out, the horse to make a journey, or to put in the plough, or the money to buy food and clothes, or lend at interest; and if he were so idle as to assign any of these reasons, no issue could be raised on a denial. So, if a suitor state that he has a right of way, or is a visitor of a literary or eleemosynary institution, he need not allege in the first case, that he wants the right of way, to send to the mill, to the market, or to go to church; nor in the second, that he suspects abuses. It is enough to assert the existence of his right, and its obstruction. This is the rule in ordinary cases, and there is no difference between them, and that of a mandamus, called for on account of the obstruction of a plain and substantive right. A man illegally kept out of office, is not bound to state the motives which induce him to seek relief. In cases where the right to a mandamus is not evident, and the grant of it purely discretionary, it is expedient, and perhaps proper, that the party should state some sufficient reasons; this is done on an affidavit, but it is doubtful whether they could be traversed, and an issue raised thereon. In the present case, the right is evident; reasonable motives are manifest; the exception is of the most general nature; and every intendment can be made to support the petition. The application is to the justice, not to the discretion of the court.

The petition contains an express averment that 'all access to the books before mentioned, as well as to the other books of the bank, has been refused.' The affidavit annexed to the petition, extends to this averment. In our enquiry with regard to the sufficiency of the petition, and the fitness of the defendants' exception, we must assume that the plaintiff was prevented from examining any of the books of the bank. If this be assumed, there can be no ground for sustaining the exception. It is extremely doubtful indeed, whether a director may be excluded from the inspection, and examination of any book of the bank, even by a by-law of the corporation. The defendants' counsel contend that he may, and the answer avers, 'that by their charter, the entire management of the affairs of the bank, and *the control of its books* and property, are confided to a Board of Directors, who have the right of deciding, when, by whom, and for what purpose the said books shall be inspected.' The third section of the charter provides, 'that the pro-

perty, affairs, and concerns of the corporation shall be managed and conducted by twelve directors.' I have looked in vain in the charter, for any provision, under which the control of the books, in the manner urged, is granted. Pretensions similar to those of the appellants in this respect, were advanced in the case of *The People* v. *Throop*, already cited, and were rejected. I cannot give more cogent reasons, or use more forcible expressions, than those of Chief Justice Savage, in that case: 'The question then seems to be this, has every director of a bank a right to know the transactions of his co-directors, in relation to the management of the institution? The statement of the question furnishes the answer. What right has the president, or any other director, to demand information as to the affairs of the institution, which the relator has not? The thirteen directors were elected by the same stockholders, at the same election, to hold for the same term, clothed with the same powers, invested with the same trusts, each to exercise his best judgment in the management of the affairs of the company. Suppose a difference of opinion exists among the directors, a majority must control; but if they are divided, say six against seven, is it competent for the majority to turn the minority out of the directors' room, and refuse them any information of the business transactions of the bank? Surely such an outrage could not be defended; nor can I conceive any plausible apology for it. The directors, thus virtually rejected from office, might be the principal stockholders in the bank, and the majority might have little interest therein, or might be hostile to the best interests of the institution. These are possibilities, but have little or nothing to do with the question of right. Every director has an equal right in regard to this matter.'

By an act of the legislature of the state of New York, directors of banks are made liable for certain violations of duty, and it is provided that 'every director not present at a meeting when certain violations shall happen, shall be deemed to have concurred therein, if the facts appear on the books of the company, and he shall remain a director for six months, and shall not require his written dissent to be entered on the minutes of the directors.' After referring to this law, Chief Justice Savage asks, 'how can a director know what was done when he was not present, unless he can have access to the books which disclose what was done? The statutes do not se-

cure, in terms, to every director the right to examine the books; but by the section last quoted, and those preceding it, he may be made liable civilly and criminally for the improper conduct of his co-directors, and unless he can have the means of knowing what has been done, he cannot avoid such liability. What would be said of a legislative body, which should refuse to a member the knowledge of its proceedings which occurred while he was absent, or a perusal of its journals? This case is not entirely analogous; but it is sufficiently so, to show the character of the high handed measure adopted by the Board of Directors.'

Our statute book contains no provision similar to that of the law of New York, in regard to the responsibility of directors for the acts of the Board during their absence. In the case of *Percy et al.* v. *Millaudon et al.*, 3 La. 575, the court held, that 'every director present at a Board, is responsible for any act of it, for which he votes, or which he does not oppose, and in the latter case, for all the injurious consequences of the act, which he does not fairly labor to avert.' 'Every absent director is equally responsible, in case of extreme neglect in his attendance at the Board, or in case, after the act comes, or must have come to his knowledge, had he used due diligence, he does not labor to avert its injurious consequence.'

The law of this state, in this respect, as it is understood by this court, is so similar to that of New York, that the consequences which Chief Justice Savage draws from the latter, legitimately result from the former. The responsibility under which a director labors, must necessarily include the ability of doing every act which is necessary to avert the consequences resulting from the responsibility, *id est*, to take cognizance of every thing that is done in the management of the affairs, with the supervision of which he is entrusted. The charter commits to twelve directors the management and conduct of the property, affairs, and concerns of the bank. The trust is to every director, and not more particularly to any one than to another. How then can it be said that a director may be excluded from the knowledge of any part of the affairs or concerns, which he is to manage and conduct. They are all equally responsible, and must have equal powers.

I conclude that the first judge did not err in overruling the de-

fendants' exception; that the right of the plaintiff exists; that the writ of mandamus is his remedy; and that his petition contains all the allegations required by the Code. On the merits, the record shows that the plaintiff is a director and stockholder; that he applied for leave to examine the list of stockholders, transfer book, and stock ledger, and was refused. There is no evidence of his having asked, and much less of his having been refused access to any other book.

It is at all times desirable that important questions should be settled according to their merits, and not evaded on mere technical grounds. In the examination of this case, I have been struck with the injury that would result to the community, if the conduct of the appellants received the least countenance from this court. I have not therefore, thumbed english law books, in search of any of the technicalities of the common law which might prevent the examination of the case on its merits; yet I have listened with patience and with pleasure to the able argument of the counsel for the appellants, in support of their exception to the sufficiency of the petition. Their efforts have appeared commendable, and they have gained much credit with me by abstaining from any argument in support of the conduct of their clients.

The stockholders of the bank, and the community in general, will certainly bestow applause on the efforts of the plaintiff in exposing to the world the unjustifiable conduct of the appellants. Charity will always endeavor to find in acts which public opinion condemns, some grounds on which they may be excused or extenuated. I have taxed my ingenuity in search of such, in the present case. I had hoped that the counsel for the appellants, would have presented some. Their talents and their zeal had fostered this hope. Their silence on this part of the case, has confirmed the conclusion to which its examination has led me, to wit, that the conduct of their clients is indefensible.

I had at first some doubt on that part of the decree which allows the benefit of the mandamus to any stockholder, although the petition is not alleged to be filed for the benefit of the other stockholders, and there is no prayer to that effect. It is a well settled rule, that where a litigation takes place in relation to a right which is common to many persons, any individual may sue for the benefit

of himself, and of others having a like interest, notwithstanding such persons are not named; and that such persons are bound by the result of the litigation, although their consent has neither been asked nor given. In Story's Equity Reps. p. 120, *et seq.*, the general principle, and cases under it are stated. In p. 121, a case is given, where a decree between a lord of a manor and some of the tenants, is declared to be binding on all of them. So a decree between a parson and some of his parishioners as to a modus, has been held binding on all the parishioners. This rule applies where there has been a fair contest on the rights of the parties. It is very certain that if the plaintiff had asserted the right of inspection for himself and all the other stockholders, without their consent asked or given, or in spite of their dissent, the suit being supposed not collusive, the decree would bind the rights of all parties. If the decree rendered in favor of the lord of the manor, or of the parson against some of the tenants and parishioners, binds them all, there can be no reason, but one of a purely technical character, why a decree between one stockholder of a trading company, asserting a right which is purely common to him with all the other stockholders, and the corporate body, should not be held binding as between every stockholder and the corporate body. If any other stockholder wished to avail himself of the decree, it would only be necessary for him to allege the fact of such decree, that he was a stockholder, and that the right was refused to him; and if these two last facts were sworn to, the peremptory mandamus might issue in the first instance. In extending, therefore, the benefit of the decree to any stockholder, the court only embodied in its judgment a general rule, principle, or corollary, which followed from the establishment of the main proposition; and this rule applies with peculiar force in this case, inasmuch as the rights of one stockholder, in relation to the right claimed, can in no manner vary from the rights of any other stockholder. The observation of Lord Chancellor Cottenham, in the case of *Taylor* and *Johnson*, as cited in Story's Equity Rep. p. 767, has its proper application in this case, to wit: that 'it is the duty of every court of equity to adopt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases which, from the progress daily making in the affairs of men,

must continually arise, and not, from too strict an adherence to rules established under very different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy.'

The extension of the decree, therefore, to any other stockholder, neither helps nor hurts. The court below only took the pains to instruct the parties as to the legal effect of the decision in the case, viz: that if Hatch, as a stockholder, had a right to the inspection required by him, every other stockholder had the same right; and the present dispute about the matter, proves that the judge was right in thinking the latter necessary. The legislature in the late act which I have cited, has manifested its concurrence with this part of the judgment under consideration, and I have no inclination to express a dissent from it. I conclude, that this court ought to affirm the judgment.

It is, nevertheless, ordered that the judgment of the Commercial Court be reversed, and that the rule to show cause, &c., obtained against the defendants be discharged; the plaintiff paying the costs in both courts.

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Mary P. McCollum and Husband v. Adam Palmer and others.

An appeal will lie from the judgment of a Court of Probates ordering the partition of the property of a succession, where the judgment does not direct in what manner the petition is to be made, nor appoints any notary to make it. Such a judgment may be appealed from as a final one, because no further proceedings can take place under it.

The judge of the Court of Probates in ordering the partition of the property of a succession, is expressly required by art. 1027 of the Code of Practice, and art. 1267 of the Civil Code, to direct the manner in which it shall be made, and to appoint a notary to make it.

Appeal from the Probate Court of East Feliciana, *Saunders*, J.

Lyons, for the plaintiffs, praying for the dismissal of the appeal, on the ground that the judgment, from which it was taken, was not final, cited *Stokes* v. *Stokes*, 6 Mart., N. S., 350.

J. P. Bullard and *Andrews*, for the appellant, contended that the case cited by the counsel for the appellees, was overruled by *Traverso et al.* v. *Row*, 11 La., 494.

MARTIN, J. The plaintiff, Mary P. McCollum, one of the heirs of Sarah A. Palmer, her mother, instituted this suit against the surviving husband of the latter, alleging that the deceased left four other children, all of whom have arrived at the age of majority, or are emancipated, and four others, still minors, and the wards of the surviving husband; that on the dissolution of the community, which had existed between her mother and the said surviving husband, she became entitled to her part of the property of the community; and that an inventory was made, but that no partition has taken place. The petition concludes with a prayer that another inventory and a partition may be made, experts being first appointed, to ascertain whether the partition may be made in kind or otherwise; that the heirs of age, residing in the state, be personally cited, those under age by their tutor, and that a curator be appointed to one of the heirs of age, who resides out of the state. Citations were made accordingly. The surviving husband excepted to the jurisdiction of the court, pleaded the general issue, and averred that one half of the property of the community, which was inherited by the plaintiff Mary, and her co-heirs, being common to him and them, was legally adjudicated to him. Judgment by default was taken against the heirs cited. The Court of Probates decreed, that a partition should be made as prayed for. The husband appealed.

The dismissal of the appeal is prayed for, on the ground that the judgment is neither a final one, nor such an interlocutory one as occasions an irreparable injury, as either party aggrieved may be relieved by an appeal from the judgment homologating the partition to be afterwards rendered. It appears to us that the judgment is appealable from as a final one, because no farther proceedings can legally take place thereon; the judgment not directing, in what manner the partition is to be made, whether in kind, or by licitation, and no notary being appointed to make the partition. The plea to the jurisdiction not having been acted on below, we assume that it was waived.

On the merits, it appears to us that the judge erred, in failing to

order an inventory, to cause it to be legally ascertained whether the property may be conveniently divided in kind; in omitting to decree, in what manner the partition should be made, *id est*, in kind, or by licitation; and lastly, in failing to appoint a notary before whom the partition should be made. The Code of Practice, art. 1027, expressly requires the judge to direct the manner in which the partition shall be made, and to refer the parties to a notary whom he shall appoint to make the partition. The same provision is made in the Civil Code, art. 1267, which requires that when the judge has ordered the partition, and *regulated the manner in which it shall be made*, he shall refer the parties to a notary, *appointed by him*, to continue the judicial partition to be made between them. Ib., arts. 1261 and 1591.

It is therefore ordered, that the judgment be reversed, and the case remanded for further proceedings, according to law; the costs of the appeal to be borne by the plaintiffs and appellees.

Succession of Charles Morgan.

The functions of an attorney appointed by a Court of Probates to represent the absent heirs of a succession, cease whenever the heirs present themselves, or send their powers of attorney to claim their respective portions of the estate.

Where a sum of money has been left, to be expended under the directions of a particular individual, for the promotion of a specified object, he may appoint an agent to receive it, though its disbursement, for the purposes indicated by the testator, must be necessarily made by himself, or under his direction.

Lucius C. Duncan, is appellant from a judgment of the Probate Court of New Orleans, *Bermudez*, J.

Duncan, pro se., and *Kennedy*, attorney for the absent heirs, submitted this case on the points filed.

Bullard, J. The petitioner, Lucius C. Duncan, represents that the testament of Charles Morgan, deceased, had been admitted to probate, that Matthew and George Morgan had qualified as testamentary executors, and that Thomas Kennedy had been ap-

pointed attorney of the absent heirs. He further represents that himself and George Morgan had been appointed jointly and severally attorneys in fact of the heirs and legatees, and that their powers have been filed in the Court of Probates, but that said Morgan has declined accepting the agency, which in consequence devolves upon the petitioner alone. He prays to be recognized as the attorney in fact of the heirs and legatees, and that the authority of the attorney of the absent heirs, under the appointment of the Court of Probates, be revoked.

The only question which the case presents is, whether the functions of the attorney cease, on the exhibition of the powers given by the absent heirs. Article 1210 of the Civil Code, appears to be decisive of this question. It provides that 'the counsel of the absent heirs shall continue to act as such until the heirs present themselves or send their powers of attorney to claim the succession, or until the curator is finally discharged.' It is not denied that the heirs are represented by the petitioner. Their powers of attorney appear ample and properly authenticated.

But the testament contains a disposition for the promotion and extension of the church and religion of Christ, within the limits of the United States, under the direction of the Reverend Mr. Eastburn, the time and manner to be prescribed by him. For this purpose, the testator disposes of the residuum of his estate. The procuration of the trustee thus appointed, is also in the record.

The Probate Court was of opinion that none of the petitioner's constituents are entitled to the delivery of the succession, and that he cannot be put into possession; but that the executors must perform their duties in settling the succession under the will, and that the attorney appointed to represent the absent heirs must see that this duty be performed.

We are of opinion that the court erred. Eastburn, the trustee named in the will, is not an heir, and is not of course represented by the attorney of absent heirs. He may well receive the legacy through an agent, although the disbursement of it, for the charitable purposes indicated by the testator, must be made by himself, or under his direction. But the question is not whether the heirs shall be put in possession, but whether they are now duly represented in this state by an attorney in fact, so as to put an end to

the functions of the attorney of the absent heirs. Whether the executors are to proceed with the administration of the estate or not, is a question not presented by the record. The heirs are all of age, they have sent forward their powers, and in our opinion, the counsel heretofore appointed to represent them in relation to the estate is *functus officio*.

It is, therefore, decreed that the judgment of the Court of Probates be reversed, and ours is, that the petitioner, Lucius C. Duncan, be, and he is hereby recognized as the attorney in fact of the absent heirs of Charles Morgan, deceased; that the appointment heretofore made of Thomas Kennedy, as attorney of said absent heirs, be, and the same is hereby vacated; and that the costs be paid by the estate.

Burrell Myers v. John L. De Lee.

The charter of the Clinton and Port Hudson Rail Road Company empowers the company, to transfer, for any legal purpose, notes belonging to it.

Appeal from the District Court of East Feliciana, *Johnson*, J.

J. P. Bullard, for the plaintiff.

Lawson, for the appellant.

Garland, J. This suit is brought on a promissory note for $672, payable to Joseph Nichols, Cashier of the Clinton and Port Hudson Rail Road Company, or order, and by him endorsed to the plaintiff, under a resolution or order of the Board of Directors.

The answer alleges, that the corporation, under which the plaintiff claims, has no right or legal authority to transfer the note sued on, either by their charter or by-laws, and that therefore the plaintiff has no right to it.

It is further averred, that the note was pledged to the state, by virtue of an act of the legislature, passed in 1839, and a notarial act made by the company in conformity thereto; and that said note is now the property of the state.

The defendant further answers, that the debt is extinguished by compensation, the aforesaid Rail Road Company having been, at the time of the transfer, indebted to him in a larger amount.

And, finally, he says, that if the note is not discharged by compensation, he has a right to pay it in the notes of the said company.

On the trial, it was proved that the plaintiff took the note on the 1st of April, 1841, it having become due on the 27–30th of January, 1839, and that he gave a valuable consideration for it. Some time after the transfer, the note was presented to the defendant for payment, who said that he had notes of the Clinton and Port Hudson Rail Road Company at home, and that he would call and pay it. The plaintiff's attorney told him, that if he had the notes, he supposed he should be compelled to take them. A few days afterwards, the attorney again saw the defendant, who made the same statement, when the former told him, that he would not take the notes of the company. On neither occasion was any tender made of the notes; nor were any ever offered at the trial, or at any other time.

The note sued on, was transferred by authority of the Board, to pay debts which the corporation owed.

There was a judgment against the defendant, from which he has appealed.

In the year 1833, the legislature created a corporation for the purpose of constructing a rail road from Port Hudson to Clinton, in the parish of East Feliciana. By subsequent acts this charter was amended, and banking privileges were conferred ; and, finally, by an act passed in 1839, the state issued its bonds for $500,000, as a loan to the company. In order to secure the payment of said sum and interest, the corporation was bound to mortgage and pledge the rail road, the stock in the institution secured by mortgages on real estate, and all its other property, movable and immovable. Acts, 1839, p. 214, sec. 2.

In partial conformity with the last mentioned law, the corporation, by its authorized agent, passed a notarial act, by which it mortgaged, or pledged to the state, the rail road, all the stock secured by mortgages, and the real estate, but nothing was said about the notes, or a pledge of them.

Under the powers granted by law to the Clinton and Port Hudson Rail Road Company, we think that the corporation has the power of transferring the notes due to it, for the purpose of paying its debts, or for any other legal purpose. The title of the note is, therefore, legally vested in the plaintiff.

There is no evidence that the note ever was pledged to the state, admitting such a pledge to have been necessary under the act of the legislature, passed in 1839. No mention of this note is made in the act of pledge or mortgage, nor was it ever delivered to the state, or to any of its officers; it is, therefore, no pledge of the note, according to law. Civ. Code, arts. 3119, 3120.

As to the defendant's claim to pay the note in the notes of the company, it is unnecessary to notice it, as he never tendered the notes, or made any legal effort to pay with them, or any thing else.

The defendant's plea of compensation, cannot avail him. The cashier of the bank says, that he had a deposite in the same, but that he understood it was there to pay another debt. The compensation, based on the account filed by the defendant, cannot be sustained. The demand was unsettled when the note was transferred, and there is no evidence that anything was owing from the bank or company to the defendant at the time; and it is shown that there are other debts due from defendant to the company, not included in the settlement.

Judgment affirmed.

Isaac McCord and others v. The West Feliciana Rail Road Company.

Suit on a contract entered into by certain individuals, the petition setting forth their names, and reciting that, under the firm of *Isaac McCord and Company*, they had undertaken to execute certain work. In articles of partnership, entered into for the purpose of executing the work, subsequently to the contract, it is provided that the name of the firm shall be *McCord and Company: Held*, that the variance between the name of the firm as recited in the petition, and as set forth in the articles of agreement, is immaterial.

Where the record shows that all the persons who entered into the original contract with the defendants, are plaintiffs, it will be no objection that others, who became subsequently interested in the contract, without the privity of the defendants, are not made parties to the suit.

Where a partnership has been dissolved by the death of one of the members, an action may be maintained by the survivors, and the legal representatives of the deceased.

In an action by the survivors, and the curator of the succession of a deceased partner, the death of the curator *pendente lite*, is no cause for dismissing the suit. The action may be prosecuted by the heirs, or other legal representatives of the deceased partner.

Action before the District Court of West Feliciana, *Weems*, Parish Judge, presiding. The petition alleges that the defendants are indebted to the plaintiffs in the sum of five hundred thousand dollars, for this: that on the 13th of January, 1836, the petitioners, Isaac McCord, John Thompson, Usal Hopkins, since deceased, and whose succession is represented by Archibald Harralson, as curator, John Cummings, and Charles A. Snyder, did, under the firm of Isaac McCord and Company, bind themselves to execute all 'the grading and road formation' of the West Feliciana Rail Road, for which the Rail Road Company agreed to pay them in the manner set forth in the contract annexed to the petition. The petitioners also allege that it will appear from the contract, that the work to be executed by them amounted, at the contract prices, to the sum of five hundred thousand dollars; that soon after the said 13th of January, they commenced the execution of their part of the contract, and continued to discharge every obligation, which it imposed on them, until the 1st of August, 1837, when, although they had taken all the necessary measures for complying on their part with the contract, by engaging laborers, purchasing timber, procuring

tools, &c., they were compelled to suspend operations, in consequence of the neglect of the company to perform its part of the contract. They allege, that up to the time when they were thus compelled to suspend operations, they had executed work, of which the particulars are detailed, to the value of five hundred thousand dollars. They further allege, that in consequence of the failure of the Rail Road Company to comply with its engagements in various important particulars, which are specified, they have sustained damage to the amount of five hundred thousand dollars.

The petitioners also aver, that the defendants are indebted to them in the further sum of thirty thousand dollars, for the erection of a bridge over the bayou Sara, under another contract made with them on the 9th of December, 1836.

By a provision in the articles of copartnership entered into between the plaintiffs, on the 7th of May, 1836, it is declared 'that the association shall be known as the firm of *McCord and Company*.' It appears from these articles, that one Henry Colestock was also a member of the association, though not a party to the contracts with the Rail Road Company, which had been executed on the 13th of January, preceding. The subsequent contract of the 9th of December, 1836, for the erection of the bridge over the bayou Sara, is not in the record. On the 17th of December, 1839, the death of Harralson, the curator of Hopkins, one of the plaintiffs, was suggested, and leave obtained from the court to make the representatives of Hopkins parties to the suit; and on the 27th of May, 1841, John Cummings, who had been appointed curator to his vacant succession, was made a party.

Lobdell and *Turner*, for the appellees. No counsel appeared for the plaintiffs.

Bullard, J. The defendants relied, in the court below, on the following exceptions, which were pleaded *in limine litis*. 1. That the plaintiffs cannot maintain the action under the name and style of Isaac McCord and Company, because the name in the articles of partnership is McCord and Company. 2. That there were other parties to said contract, who have not been made parties to this action. 3. That the partnership was a special one, and was dissolved by the death of Hopkins; and no action can be maintained in the name of the late firm. 4. That the petition is vague, uncer-

tain, and contradictory. 5. That the damages are not specially set forth, and that only special damages can be recovered. 6. The death of Harralson, curator of one of the parties, since the inception of the suit.

The second and fourth exceptions having been sustained, and the suit dismissed, the plaintiffs appealed.

I. The names of the plaintiffs are set forth, and whether they call themselves Isaac McCord and Company, or McCord and Company, is not material.

II. The record shows, that all the persons who entered into the original contract with the defendants, are plaintiffs in this action. If other persons became interested afterwards, it does not appear that it was with the privity of the defendants, and they can have no direct action upon the contract. The action was well brought, in the names of the original contracting parties.

III. Admitting that the partnership was dissolved by the death of Hopkins, it does not follow that the parties, and their legal representatives, could not maintain this action.

IV and V. The petition appears to us to set forth the cause of action, with sufficient certainty.

VI. The death of the curator of one of the original contractors, *pendente lite*, does not appear to us a sufficient cause for dismissing the action. The heirs, or other legal representatives, might well come in, and prosecute the suit.

We conclude that the court erred in dismissing the suit.

It is, therefore, adjudged, that the judgment of the District Court be reversed, and that the cause be remanded for further proceedings according to law; the defendants paying the costs of this appeal.

ANDRÉ BIENVENU ROMAN, Governor of the State of Louisiana, for the use of JAMES CORLIS v. SAMUEL J. PETERS and others, securities of CHARLES F. HOZEY, sheriff.

Judgment for a certain sum, with damages at twenty per cent a year, from a period anterior to the judgment, till paid: *Held*, that to obtain a suspensive appeal, the bond must exceed by one-half the amount of the judgment, including the damages which had accrued at the time it was rendered.

APPLICATION for a writ of prohibition to the judge of the District Court of the First District, *Buchanan*, J.

MARTIN, J. Peters and others, sureties of Hozey, the sheriff, and appellants in this case, pray that the execution, which has issued since the appeal on the ground that an insufficient bond was given, may be enjoined.

The judgment is against the six sureties *severally* for $1353, 58, withd amages thereon at the rate of twenty per cent per annum, from the 11th of July, 1840, till paid. Four of the sureties, are applicants for an injunction. Three of the applicants, have, with a fourth obligor, given a joint and several bond for twenty five hundred dollars; and the fourth applicant, with an other obligor, has given a joint bond for the same sum. The four applicants united in one petition of appeal, on which the judge made an order granting the appeal, on their giving surety in the sum of twenty five hundred dollars. It is clear, the appeal on such a bond is devolutive only. Each judgment was for $1353 58, and damages, which, at the time of rendering the judgment, amounted, at twenty per cent per annum, from the 11th of July, 1840, to the 19th of January, 1842, upwards of eighteen months, to more than four hundred dollars, making in all $1753 58. The bond for a suspensive appeal, according to art. 575 of the Code of Practice, ought to have been for that sum, and one-half more, or $2630 37, for each appellant. The application must therefore be rejected.

Micou, for the application.

Eggleston, contra.

Richard H. Chinn v. The First Municipality of the City of New Orleans.

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Where a judgment has been obtained against a party, in a case not expressly included among those in which the Code of Practice prescribes that an action of nullity will lie, and he shows that he will sustain real injury unless he can obtain relief, which cannot be had on appeal, and the case presents facts on which, in the other states of the Union, a court of equity would interfere, relief may be granted; but not unless the applicant state particularly and specially the nature of the defence, and the facts on which he seeks relief, and prove that he has been guilty of no *laches*. It will not suffice to allege, that he has a good and valid defence to the action.

Rule to show cause why a mandamus should not be issued to the judge of the District Court of the First District, *Buchanan, J.*

Martin, J. The judge of the First District, in answer to a rule to show cause why a mandamus should not be issued, commanding him to grant an injunction on the petition of the First Municipality, states:

First, That the injunction, asked by the Municipality, would be a renewal of another theretofore granted and dissolved; and from the dissolution of which there is no appeal.

Secondly, That the allowance of the injunction was a matter in his discretion, which was duly exercised; and for this he refers to the record of the suit.

The rule was granted, on the affidavit of the Municipality, that shortly after the rendering of the judgment against it, a petition was presented, praying that its nullity might be declared, and that the execution of it might be enjoined. The injunction obtained was dissolved, on the ground that the facts on which it was claimed had not been sufficiently set forth. Whereupon, a second petition was presented, in which the deficiencies of the first were attempted to be supplied, and a second injunction was prayed for, with a tender of the bond and security required by law. The judge refused to allow the injunction.

The original petition averred that a judgment by default taken against the Municipality had been confirmed, and made final. It alleged, that both the judgment by default, and the final one, are null, because before either was obtained, the attorney of the Municipa-

lity had prepared an answer, which he had sent, and which had been delivered to the clerk of the court, or to one of his deputies, which answer was lost. In the second petition, the insufficiency of the first was attempted to be supplied, by an averment that the answer prepared by their attorney contained the plea of the general issue, and that the Municipality had a good and valid defence, which it would have established on the trial of the suit, if an opportunity had been afforded to it to do so.

The verity of the allegations in both petitions, was attested by the mayor, and by the individual by whom the attorney of the Municipality had sent the answer to be filed.

This action does not expressly present one of those cases, in which, the Code of Practice declares that an action of nullity will lie; but we are not ready to say, that after a judgment has been obtained, by which the party shows that he will sustain a real injury unless he can obtain relief, and that relief cannot be sought in this court, it may not be obtained in the lower court, where the case presents facts, on which, in the other states of the Union, a court of equity would interfere. But the applicant must show specifically the facts on which he seeks relief. It does not suffice for him to say, that he has a good and valid defence. He must state particularly and specially, what that defence is; and he must show that he has been guilty of no *laches*. In the present case, the party is not able to show whether the answer was given to the clerk, or to one of his deputies. It does not appear that, on the part of the defendants, any attention was paid to the case, until after the execution reached the hands of the sheriff. The plea of the general issue, we assume, was disproved; for otherwise, the judgment could not have been made final. It is not pretended that the plaintiff had recourse to any improper means to obtain the judgment; and the Municipality has not shown, nor even averred, specially, any particular fact, which may lead to the conclusion that another trial would produce a different result. The allegations on which the extraordinary remedy sought for is expected, are too general and indefinite. The rule must, therefore, be discharged.

Roselius, for the applicants.

Chinn, pro se.

JACQUES POTIER v. CHARLES HARMAN and another.

Both the debtor and his vendee must be made parties to an action to annul a sale, alleged to have been made in fraud of the rights of the plaintiff as a privileged creditor.

CHARLES HENRY BREISGASS, one of the defendants, is appellant from a judgment of the District Court of the First District, *Buchanan*, J., annulling a sale from Harman to Breisgass, of the contents of a shop, which the plaintiff had sold to Harman. The petitioner avers that the sale to Breisgass was fictitious, and intended to defraud him of his privilege on the goods for the balance of the price, for which Harman had given his notes. The notes were not due at the institution of the suit; but became so, shortly afterwards.

The appeal bond was executed on the 19th of January, 1839, with one Nichols as security. By an agreement of the 18th of February following, between the counsel of the plaintiff and the appellant, it was stipulated that if a particular person should be added as a further security on the appeal bond, no motion should be made to dismiss the appeal. It does not appear from any thing in the record, that the additional security was ever furnished. The record was filed in the appellate court on the 18th of February, 1839. On the 2nd of November of the same year, a rule was taken before the judge of the District Court, on the defendant, to show cause 'why his appeal should not be set aside, on the ground that he had not furnished security according to law, and to his agreement.' On the trial of the rule, the judge, 'taking into consideration the written agreement between the parties, and the proof that both the defendants had absconded, and that their counsel had removed to Texas,' ordered the appeal to be set aside.

SIMON, J.* This case comes before us in a very imperfect state. The plaintiff, who seeks to set aside a sale of certain goods, which he alleges was made by one of the defendants to the other, in fraud of his privileged rights, prayed that both his debtor and Breisgass, the vendee, might be cited, that a writ of sequestration might be

* This opinion was delivered, March 30th, 1840.

issued, the goods be sold, and that he have judgment against both defendants for the amount due him. Breisgass, only, was cited, and joined issue. His co-defendant does not appear to have been cited, nor, if he was absent from the state, was any curator *ad hoc* appointed to represent him. In this state of the case, the parties before the court proceeded to trial; a verdict was found by the jury in favor of the plaintiff, and the defendant, Breisgass, after an attempt to obtain a new trial, appealed. It is also to be noticed, that the judgment of the court was rendered on the 10th of January, that the motion for a new trial was made on the 14th, and that on the 17th, after the judgment, an attorney was appointed by the court to represent the absent defendant, Harman.

It is perfectly clear, that this action, which is one to revoke a contract made in fraud of the rights of a privileged creditor, could not be exercised against Breisgass alone, since the debt claimed by the plaintiff, had never been liquidated by a judgment; and it was necessary, in order to reach the plaintiff's objects, that both the parties against whom the fraud is alleged, should have been represented in the suit. Civil Code, arts. 1967, 1970, and 1971. It is true, that the plaintiff, in his petition, prayed that his debtor might be cited, and it must have been a great oversight on the part of his counsel, to have proceeded to judgment, without having the defendant, Harman, legally represented. We think, however, that the justice of the case requires that it should be remanded.

It is, therefore, ordered, that the verdict be set aside, and the judgment of the District Court be reversed; that this case be remanded for further proceedings; and that the plaintiff and appellee pay the costs in this court.

Schmidt, for the plaintiff.

Randall, for the appellant.

SAME CASE—RE-HEARING.

Where an appeal has been taken, and bond and security given according to law, the inferior court has no further cognizance of the case, than to send up the record.

One who has sustained no injury by a sale, has no right to annul it, though it may have been intended to defraud him.

Schmidt, prayed for a re-hearing: *First.* Because the appellate court could not take cognizance of the appeal, which had been dismissed by the District Court, unless such dismissal had been appealed from, which was not the case. To entitle a defendant to an appeal, he must give bond, *with good security, residing within the jurisdiction of the court*, &c. Code of Prac., 575. The plaintiff has a right to show the insufficiency of the security, which cannot be done in the appellate court, as it involves a question of fact, depending on the testimony of witnesses. Unless the lower court possess the power of rescinding the appeal, the plaintiff may be deprived of his clearest rights.

Secondly. Because it was unnecessary to obtain a judgment against Harman, previously to proceeding against Breisgass. The action is *ex delicto*, and both defendants are liable *in solido*. *Morizart, &c.* v. *Jacquinet.* 2 Dallez, 1829. Jurisprud. XIX Siecle, p. 136. Where parties are liable *in solido*, either may be sued.

Randall, for the appellant.

GARLAND, J. A re-hearing has been granted in this case, on two questions:

First. Whether this court can take cognizance of the appeal, after it has been dismissed by the District Court because of the insufficiency of the security on the appeal bond.

Secondly. Whether it was necessary to take a judgment against Harman, or to make him a party, previous to obtaining a judgment against Breisgass.

Upon the first point, it has been often decided, that after an appeal has been taken, and bond and security given according to law, the inferior court has no further cognizance of the cause, than to send up the record. 4 La., 205. 7 Ib., 448. 9 Ib., 49. In this case, an agreement as to the security was entered into by the parties. It is not shown, that it has been violated in any respect; and the

proceedings in the District Court seem to us altogether irregular, as the appeal had been for several months pending in this court.

Upon the second point, we are of opinion, that our judgment was correct, as it does not appear whether Harman was solvent or not. It may be, that he is able to pay the debt claimed. If so, no injury has been sustained by the plaintiff. His debts were not due at the time of the sale from Harman to Breisgass, and if the former should be legally pursued, it is possible that the notes may be collected, without interfering with the sale in question. It may be, that the sale was intended to defraud the plaintiff; but if he sustains no injury by it, he has no right to annul it. All the parties should be before the court, either in person, or by their legal representatives, to enable us to do justice among them.

We therefore see no reason to change our former judgment in the case.

Daniel Comstock and another v. Jean Créon.

A *fieri facias* may be issued while a debtor is imprisoned, or within the limits under a *capias ad satisfaciendum*.

To preserve his recourse upon the surety in a bond to keep the prison bounds, the plaintiff must so conduct his proceedings as to be at all times able to subrogate the former, to all his rights and privileges against the debtor.

A debtor, arrested on a *capias ad satisfaciendum*, having given security to keep the prison limits, the plaintiff, on discovering property, took out a *fieri facias*, and seized it, whereupon, the debtor made a voluntary surrender for the benefit of his creditors, which was accepted by the judge, and on the same day broke the limits; when, all proceedings having been arrested, the *fieri facias* was returned; on the opposition of plaintiff, the surrender was rejected; and the latter, having abandoned his *fieri facias*, sued the security on his bond: *Held*, that the *fieri facias* was legally issued, and gave a lien on the property; that the surrender having been set aside, the plaintiff might have proceeded to make his money; and that by neglecting to do so, the surety was released.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

A suit having been commenced against the defendant on two

separate bonds, for the prison limits, the actions were consolidated, by consent, in the court below.

Eggleston, for the plaintiffs. 1. The debtor is bound, at his peril, to keep within the limits; in case he breaks them, his surety must suffer. 1 Moreau's Dig. p. 572, sec. 13. 8 Mart. N. S. 108. 7 Johnson, 168. 2. There is no proof that the debtor returned within the limits, *before* the suit against the surety; but the establishment of the fact, would not discharge the latter. 1 Moreau's Dig., p. 572, sec. 13. *Tillman* v. *Lansing*, 4 Johnson, 45. *Dash* v. *Van Kleeck*, 7 Ib. 479. 9 Ib. 234. 3. The debtor had no right to leave the limits, before the homologation of the deliberations of the creditors. 1 Moreau's Dig. pp. 568–9, secs. 4, 5, 6. 4. The *alias fieri facias* did not operate a release, of any advantage acquired under the *capias ad satisfaciendum*. *Elliott* v. *Cox*, 5 Mart. N. S. 286. The plaintiffs acquired no rights by the *alias fieri facias*. *Hanna* v. *His Creditors*, 12 Mart. 32. 5. The principal debtor alone, could complain of any irregularity in issuing the *alias fieri facias*. 13 Johnson, 529. 6. Where the execution of a *fieri facias* is countermanded, no lien is acquired. *Hanna* v. *His Creditors*, 12 Mart. 32.

Bodin, for the appellant. The plaintiffs cannot allege the nullity of an execution, taken out by themselves.

Garland, J.* The plaintiffs having obtained, in the City Court of New Orleans, two judgments against John Bertrand, issued executions on them, which being returned *nulla bona*, writs of *capias ad satisfaciendum* were taken out, and Bertrand arrested. He gave two bonds to keep within the prison limits, on which the defendant became his security. After these bonds were given, the plaintiffs again issued writs of *fieri facias*, and had the property of Bertrand seized, and advertised for sale, he still being within the prison limits; whereupon, he made a voluntary surrender of his property, which was accepted by the judge, for the benefit of all the creditors, and the same day Bertrand went beyond the prison limits, whereby the plaintiffs aver, that the bonds are forfeited, and the security liable. By this surrender all proceedings against the person and property of Bertrand were arrested, and the last writs of

* Morphy, J., having been of counsel in this case, did not sit on its trial.

fieri facias were returned into court. The plaintiffs made opposition to the surrender offered by Bertrand, and finally had it rejected, upon the ground that a debtor within the prison limits, or in actual custody, cannot make a voluntary surrender, but must proceed under the act of 1808 to obtain relief. They then abandoned their last executions, and sued the defendant on the bonds. They had a judgment in the court below, from which the defendant has appealed.

In this court, the plaintiffs contend, that their issuing the two executions after Bertrand was in custody, was irregular and illegal, and did not set aside the *capias ad satisfaciendum*, under which he was confined. The defendant alleges, that the taking out of those executions was an abandonment of the writ of *capias ad satisfaciendum*, and that he is discharged.

The plaintiffs complain, with rather poor grace, of the illegality of their own acts, while they endeavor, at the same time, to make a security suffer by them. They had their executions out, a seizure made, and consequently a lien upon the property seized. This forced a surrender; they opposed it; had it rejected; then abandoned their executions,* seizure, and lien, and attacked the security on the bonds.

We are of opinion that the last executions were not illegally issued; and that as the surrender was rejected, the plaintiffs might have proceeded with their seizure, and have made their money, and thereby released Bertrand from custody, and the defendant from responsibility. The plaintiffs should, in their proceedings, have so conducted themselves, as to have been at any time able to subrogate the defendant to all their rights and privileges against

* The petitions in the two actions, subsequently consolidated in the lower court, were filed on the 22d of August, 1839. The order of the District Court of the First District, accepting the surrender of Bertrand, was made on the 10th of July preceding. The opposition of the plaintiff, was filed on the 22d of the same month; and had not been tried at the institution of the suits, on the 22d of August, but the judgment rescinding the order of the 10th of July, and rejecting the application of the insolvent, was rendered before the trial of the consolidated cases against the surety, which took place on the 20th of March, 1840. It was admitted, that the debtor had returned within the limits *at the time of the trial* of the cases against the surety; but no proof was adduced to show, that he had returned before the institution of the suits.

Bertrand, had he, (Créon,) paid the debts. They have failed to do this, because by abandoning their executions, and seizure, they are unable to transfer to him all the rights they possessed; whereby, we think, the security is released.

The judgment of the Commercial Court is therefore reversed, and a judgment given in favor of the defendant, with costs in both courts.

ADOLPHE BERTRAND DUMONTEIL and others *v.* CHARLES DUBROQUA.

Under the act of 20th March, 1839, sec. 6, a writ of sequestration may be issued in all cases, where one party fears that the other will conceal, part with, or dispose of the moveable or slave in his possession, during the pendency of the suit. To obtain such sequestration, it will suffice that the applicant make oath, that he fears and believes that the moveable or slave will be illegally disposed of by the defendant.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

This case was submitted to the court on the points filed, by *Andry*, and *A. M. Guyol*, for the appellants, and *Canon*, for the defendant.

BULLARD, J. The object of the present suit appears to be to annul a contract, by which the parties settled a partnership concern, on various grounds not now necessary to mention. Certain notes which the plaintiffs allege were given by them to the defendant, amounting to about fourteen hundred dollars, but which the latter deposited in the hands of one Bigourdan, as security for the correctness of his *gestion*, and which were to remain deposited until the 15th of August, 1841, were ordered to be sequestered, the plaintiffs making oath that they feared, and verily believed, that the notes mentioned in the petition would be illegally disposed of by the defendant, unless sequestered.

The sequestration was set aside on the motion of the defendant, on the ground that it was not supported by the petition and affidavit, and that no sufficient legal cause had been shown for such sequestration; the court considering the affidavit insufficient, in not stating the sums claimed by the plaintiff, and the cause of action.

The cause of action appears to us to be sufficiently set forth. It is the nullity of an agreement between the parties, in pursuance of which the notes, the sequestration of which was demanded, were given, and were to remain deposited until a given day. If the plaintiffs succeed in their action, the notes become void; and the plaintiffs swear, that they fear and believe that the notes will be illegally disposed of, pending the suit. The case, therefore, appears to us to be provided for by the 6th section of the act of 1839, entitled an act to amend the Code of Practice. 1 Bullard and Curry's Digest, 156, *verbo* Code. That amendment of article 275 of the Code of Practice, authorizes a sequestration 'in all cases where one party fears that the other will conceal, part with, or dispose of the moveable or slave in his possession, during the pendency of the suit.'

The judgment of the Parish Court is therefore reversed; and it is ordered, that the sequestration be reinstated, and the case remanded for further proceedings, according to law; the defendant paying the costs of the appeal.

ALEXANDER PRIEUR *v.* JAMES ALLEN and another.

APPEAL from the District Court of the First District, *Buchanan*, J.

L. Pierce, for the plaintiff, submitted the case without argument. No counsel appeared for the appellant.

MORPHY, J. This suit is brought on two promissory notes, one of $1103 15, drawn by Allen and Devergés, to the order of, and endorsed by Townsley, Prieur, and Company, and paid by the plaintiff, and the other, of $200, drawn by the same parties to the order of the plaintiff. The defence set up by Allen, who alone answered, is, substantially, that the notes sued on, though given in

the partnership name of Allen and Devergés, were subscribed by Devergés without the knowledge and consent of the respondent, and for the satisfaction of some private debt of the former, and that the said notes were antedated, having been given after the dissolution of the co-partnership between them; all which facts are averred to have been within the knowledge of the plaintiff. There was a judgment below against the defendant, Allen, from which he has appealed.

To substantiate the averments of his answer, the defendant, Allen, propounded to the plaintiff interrogatories on facts and articles; but the answers of the latter, entirely negative the defence set up. Nor has any thing been legally proved, by the testimony of the witness taken under a commission. So far as it goes to support the defence relied on, it rests in a great measure on hearsay, and does not show in the plaintiff any knowledge of the facts stated in the answer.

Judgment affirmed.

Andrew Gray v. The Commercial Bank of New Orleans.

Where, in an action on sundry bank notes, they are described by their numbers and letters, and by the names of the President and Cashier who signed them, and are annexed to the petition though not made a part of it, the description will be sufficient.

Notes annexed to a petition cannot be withdrawn, without leaving copies, which will form part of the record.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Wharton, for the plaintiff, cited *Weyman et al.* v. *Cater*, *&c.* 13 La. 492. *Denton* v. *The Commercial and Rail Road Bank of Vicksburg*, Ib. 486.

Canon, for the appellants.

Bullard, J. This is an action upon sundry bank notes, issued by the defendants, and the plaintiff demands judgment for their

amount, and interest at ten per cent thereon, from and after the protest for non-payment, according to the charter of the bank. There was judgment accordingly, and the defendants have appealed.

The counsel for the appellants relies upon an exception which was overruled by the court below, to wit, that the petition is insufficient, in not setting forth the dates of the notes sued on, and in not being as full and certain as the law requires.

The original notes were annexed to, and filed with the petition. Although not made a part of the petition, they might be referred to, with a view of enabling the defendants to shape their defence, and the defendants are effectually protected against a second action on the same notes, inasmuch as they could not be withdrawn without leaving copies, which would form, together with the protests, a part of the record. The notes are further described by numbers and letters, and the names of the president and cashier are set forth in the petition.

The court, in our opinion, did not err in overruling the exception.

Judgment affirmed.

MATHIAS RODRIGUEZ, Syndic, v. PIERRE DUBERTRAND and another.

Wherever his domicil may be, a syndic of the creditors of an insolvent is always amenable to the court under whose authority he was appointed, and to whom he is accountable for his administration. By accepting the appointment, he waves any right to except to the jurisdiction on the score of domicil. So, where a syndic has been removed, an action against him for a balance due to the creditors, is properly brought before the court seized of the *concurso*.

In an action by the syndic of the creditors of an insolvent, against a former syndic, to recover a balance due to the estate, evidence is inadmissible to prove payments to the creditors not sanctioned by an order of court. Such evidence, if admitted, would not be conclusive against the creditors, contradictorily with whom the claims, alleged to have been paid, must be proved, as well as their rank and privilege.

In an action by the syndic of the creditors of an insolvent, against a former syndic, by whom payments had been made, before the act of the 13th of March, 1837, to the creditors of the estate without an order of court, but without fraud; *Held*, that the defendant should be allowed an opportunity to prove, contradictorily with the creditors, that he had discharged debts due by the insolvent, and that in so doing he did no injury to the creditors still unpaid, which can only be done on the filing of a tableau of distribution by the new syndic; and *judgment* against the latter for the whole amount received as syndic, with a stay of execution on giving security for the payment of any balance which it may appear, on the filing of the final tableau of distribution by the new syndic, that he has no right to retain.

The penalties imposed by the act of 13th March, 1837, amending the act relative to the voluntary surrender of property, are only applicable to cases arising subsequent to its promulgation.

A mortgage creditor, who buys the property subject to his mortgage, cannot be compelled to pay the purchase money, which he is entitled to receive by preference.

APPEAL from the District Court of Ascension, *Duffel*, Parish Judge, presiding.

This case was submitted to the court on the following points:

Miles Taylor, for the plaintiff. 1. The suit was properly brought before the court having jurisdiction of the insolvency. 2 Moreau's Dig. p. 424, secs. 1, 12, 14, 30, 33, 34. Ib. p. 437, secs. 2, 7. Code of Pract. 130, 162, 164, 165, 997. 2. The proceedings being subsequent to the act of 13th March, 1837, the plaintiff is entitled to interest at thirty per cent a year, from the 13th of October, 1837, the date of the judgment ordering a meeting of

the creditors for the appointment of other syndics in place of the defendants.

Ilsley and *Nichols*, for the appellants. 1. The court below erred, in overruling the exception to its jurisdiction, the defendants being domiciliated in New Orleans, and the action being against them, in their individual capacities, for alleged misconduct. Not being embraced in art. 165 of the Code of Pract., they are suable only before the courts of their domicil. Code of Pract. 162. 3 La. 137. *Poydras* v. *Taylor et al.* 18 La. 17. 2. The court erred, in rejecting evidence of the payments made to the creditors of the insolvent; if improperly made, before the homologation of a tableau, the defendants were subrogated to the rights of the creditors they had paid. 3 Mart. 308. 3. The act of 13th March, 1837, applies only to cases subsequent to its promulgation.

Morphy, J. This action is brought by the syndic of the creditors of Pierre Amirati, of the parish of Ascension, against Pierre Dubertrand and Henry Hopkins, former syndics of the estate, appointed in 1835, but subsequently removed from office in due course of law. The petitioner seeks to recover the sum of $33,500, which, he alleges, came into the hands of the defendants from the sale of the property surrendered by the insolvent. He also claims interest thereon, at the rate of thirty per cent per annum, from the time it was so received, on the allegations, that the defendants have never deposited the monies belonging to the estate in any chartered bank, as required by law, and that since they have been divested of their office, they have retained the same in their hands and refused to pay the amount over to the new syndic. The defendants, residents of New Orleans, excepted to the jurisdiction of the court, on the score of commorancy. This exception having been overruled, they answered, averring, that as syndics of Amirati, they received jointly certain monies; but that they diligently discharged their duties according to law, and faithfully paid over to the creditors of the insolvent all the monies so received, according to a tableau, or account, which was filed by them in the District Court of the Second District, on the 10th of April, 1838. They further aver, that should the payments made by them, be considered irregular and illegal, they are subrogated to the rights of the creditors, whose claims they have discharged; and that they are legally entitled to

deduct from the money they have received, the amount that will be really due to them on a final distribution; and they aver, that on the filing of the account, which they annex to their answer, as a part of it, they had actually paid $27,551 19.

There was a judgment below against the former syndics, each for one half, for $33,444, with ten per cent on said amount, and the costs incurred in effecting the appointment of the present syndic; reserving to them their right of action against the petitioner, for the recovery of the amounts they may have paid irregularly to the creditors, for the benefit of the insolvent's estate, as being subrogated to the rights of such creditors, with ten per cent thereon. The defendants appealed.

The judge, in our opinion, correctly overruled the plea of the defendants to his jurisdiction. In whatever parish his domicil may be, a syndic is always amenable to the court before whom the failure is pending, under whose authority he is appointed, and to whom by law he is accountable for his administration. If he has a different domicil from that of the insolvent, he waives his right to make any exception on that ground, when he accepts the appointment; and subjects himself to the power and supervision of the court, seized of the *concurso*. But the defendants, it is said, are sued, not as syndics, but in their individual capacities, in order to make them liable for alleged misconduct. It appears to us, that it is in the capacity of syndics, that they are sued. The object of the present action is to obtain the reimbursement of the funds they received as such, and the payment of a per centage, which the law inflicts on them as a penalty for their failure to comply with the duties of their office. This penalty, we apprehend, is to be pronounced by the court, under whom they hold their appointment, and before whom all the proceedings in relation to their removal have taken place.

It is next urged, that the court erred in refusing to permit the defendants to introduce evidence, to show that they made payments to the creditors of the insolvents, which, although not sanctioned by law, should avail them. We do not think that the court erred. Independently of the illegality of such payments, the evidence of them, even if admitted, would not have been binding and conclusive on the creditors, contradictorily with whom the claims alleged to have been paid by the defendants, must be proved, as well

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their rank and privilege. The defendants, therefore, could not, even on proving in this suit the sums paid by them, have been allowed to retain the amount as a deduction from the demand made against them. But, on the other hand, we do not think that, under the circumstances of this case, they should be absolutely decreed to pay to the new syndic the whole amount of such demand. It is true that, according to the strictness of law, the former syndics acted illegally in making payments without an order of court, rendered on a tableau of distribution, after due notice to the creditors; but, before the law of 1837, which has introduced more regularity in these matters, by laying down more definite rules, and denouncing heavy penalties against syndics failing to comply with its provisions, they were generally, we understand, in the habit of making those payments, which they considered as privileged, before filing their tableau, and taking the risk of the oppositions that might afterwards be made. These anticipated payments were sometimes beneficial to the mass of the creditors, as they extinguished large mortgage debts, on which high interest was running. The account which the defendants filed, before the *procès verbal* of the appointment of a new syndic was even notified to them, shows that out of a sum of about $33,000, received by them, they had paid off debts to the amount of $27,551 19, most of which purport to be privileged claims and mortgages, drawing interest at the rate of ten per cent per annum. These payments were, no doubt, irregularly made. If, however, on a tableau of distribution by the new syndic, it should appear that the sums thus paid were really due by the insolvent, and were not paid to the prejudice of claims of a higher dignity, equity would surely forbid, that the mass of the creditors should enrich themselves at the costs of the defendants, who are not charged with any dishonest or fraudulent acts.

If they should be entitled to be reimbursed for these payments, as we think they are, although not strictly legal, there would be great hardship in condemning them, in this suit, to pay to the new syndic the whole amount of the funds they received, together with a per centage thereon, when shortly after, this syndic, whose duty it would be to distribute the money without delay, would have to return to them the greatest part of it. There is some analogy between the situation in which the former syndics stand, and that of a

mortgage creditor who buys the property subject to his mortgage, and who is, therefore, himself entitled to the proceeds of the sale; and we have said that the latter should not be compelled to pay the purchase money, out of which he has the right of being paid by preference. 8 La., 301. So, in the present case, we think the defendants ought not to be compelled to pay funds, which the syndic would have to reimburse to them shortly afterwards, should the defendants prove that they have discharged debts due by the insolvent, and that in so doing they have done no injury to the creditors who are yet unpaid. They should be allowed an opportunity of making such proof, contradictorily with the creditors. This can only be done, on the tableau of distribution to be filed by the new syndic.

As to the penalties created by the act of 1837, we concur in opinion with the judge *a quo*, that they can attach only to cases arising subsequent to its promulgation, and that this case should be governed by the statute of 1817.

It is, therefore, ordered, that the judgment of the District Court be so amended, that no execution shall issue for the sum of $27,551 19, and the ten per cent decreed to be paid thereon, provided, that within thirty days from the filing of this decree with the clerk of the court below, the defendants give, to the satisfaction of the district judge, good and sufficient security to pay said sum, or such portion thereof, as it shall appear, on the final tableau of distribution to be filed by the new syndic, that they have no right to retain on account of sums paid by them to the creditors of Pierre Amirati; the plaintiff and appellee paying the costs of this appeal.

Charles Black v. John Catlett, and another.

Where there is any ambiguity in a judgment, it must be understood with reference to the verdict on which it is based, and which it must follow.

Action to rescind the sale of a tract of land; verdict for the plaintiff for the land, and in favor of defendant and reconvenor for the purchase money; and decree accordingly, declaring the land to be the property of the plaintiff, and ordering the defendant to put him in possession, on his paying the purchase money: *Held*, that the decree contains two distinct judgments, one in favor of the plaintiff for the land, and the other for the defendant for the price; that the right to have it executed is reciprocal; and that both parties must be placed on the same footing; and that the defendant may take out an execution for the price, though the plaintiff may not have demanded the execution of the judgment in his favor.

Where property has been seized under a *fieri facias* before the return day, the sheriff is not obliged to return the writ at any particular time, unless he has sold the property; where the property has not been sold, he may finish what he has commenced, though the return day have expired.

Where a *fieri facias*, under which property has been seized, is ordered by the plaintiff to be returned into court before the property is sold, the proceeding under the writ will be considered to have been abandoned by the plaintiff, the sheriff will be released from any obligation to keep the property, and the defendant may demand its restoration. To enable the plaintiff to sell the property, an *alias fieri facias* must be issued, a new seizure be made, and new notice be given.

Appeal from the District Court of East Feliciana, *Johnson*, J.

Andrews and *J. P. Bullard*, for the plaintiff.

Turner and *Lawson*, for the appellants.

Morphy, J. In a suit brought by Black, to annul a sheriff's sale made to John Catlett, of a tract of land, on account of some informalities in the proceedings which led to the adjudication, a verdict was given in favor of the plaintiff, for the land in controversy, and against the plaintiff, and in favor of the defendant and reconvenor, John Catlett, for $2,525 95, being the amount of the purchase money paid by the latter. Judgment was thereupon rendered, decreeing 'that the land is the property of the plaintiff, and that the defendant shall deliver up to and put the said plaintiff in possession of the land, on his paying him, the defendant, the aforesaid sum,' &c. Under this judgment, Catlett sued out a *fieri facias*, on the 7th of May, 1841, and had the land seized, and due notice of such seizure given to the petitioner. Some time afterwards, Catlett ordered the writ to be returned into court, and

twenty two days after the return, he took out an *alias fieri facias*, under which the sheriff was proceeding to advertise and sell the property seized under the first writ, when the plaintiff enjoined the proceedings.

Two grounds have been urged in support of the injunction, to wit:

1. That under the judgment, Catlett was not entitled to an execution.

2. That there had been under the new writ, no legal seizure of the land, and that no notice of any seizure had been served upon the plaintiff, as required by law.

I. The decree, it is said, merely allowed Catlett to retain the land until he should be reimbursed the price he had paid for it, but gave him no judgment for the money which he could enforce, while Black took no steps to get the property; that Catlett remained in possession of the land, and cultivated a part of it, without having offered to surrender it to the plaintiff, and without the latter having demanded it of him. Although the decree is not as explicit as could be desired, we cannot view it in the light presented to us by the plaintiff and appellee. When there is any ambiguity in a judgment, it must be understood with reference to the verdict upon which it is based, and which it must follow. The decree appears to us to contain two distinct judgments, one in favor of the plaintiff for the land, and one in favor of the defendant for the money paid, as clearly appears from the portion of it immediately preceding the decretal part, in which the finding of the jury is fully set forth. Any other construction would lead to great injustice and hardship. The defendant would be placed in the most awkward and precarious situation, a mere tenant at will of the plaintiff, who, at any time, as it suited his interest or convenience, might drive him away. He would have to remain in possession of property which he could not dispose of, having no title to it, and which he would not dare to cultivate or improve, lest, when it should be rendered more valuable, the plaintiff might exercise his right of entering on it. This cannot be. The right to have the judgment executed must be reciprocal, and the parties must be placed on the same footing. *Rightor et ux* v. *Winter*, 14 La. 548.

II. Where the sheriff has levied upon property under a *fieri*

facias before the return day, he is under no necessity to make his return at any particular time, unless he has sold the property. If he has not, he is bound to proceed and finish what he has commenced, though the return day may have expired. 3 La. 496. Had not the plaintiff ordered the return of the first writ, no *alias fieri facias* could have issued, until the property under seizure had been sold, and found insufficient to satisfy his demand. But by giving this order, and taking out a new writ, it appears to us that the plaintiff has abandoned the proceedings had under the original writ, and released the sheriff from the obligation of keeping the property levied upon. Had moveables been seized, and had the debtor called upon that officer to restore them to his possession, in consequence of plaintiff's order to return the writ, he could hardly have refused to give up the property, having no longer any authority to detain it. 2 La. 280. The debtor might have objected to the issuing of an *alias* writ, and have insisted upon the sale of the property seized under the first writ; but he seems to have acquiesced in the course pursued by Catlett, which, in our opinion, has had the effect of avoiding all proceedings previously had. The new execution must be carried into effect in the same manner as the one first issued, that is to say, a new seizure and notice must take place, before the sheriff can proceed to advertise and sell any property of the debtor. Code of Practice 728. But the irregularities complained of, were not of such a character, as to authorize a perpetual injunction against Catlett's right to enforce his judgment in due course of law.

It is, therefore, ordered that the judgment of the District Court be reversed, and that the sheriff be enjoined from proceeding to advertise and sell any property of the plaintiff in injunction, without making a regular seizure, and complying with all the other requisites of the law; the appellee paying the costs of this appeal.

Samuel Bell v. James N. Morrison.

Where the certificates of the judge and clerk of the lower court, show that the record does not contain all the evidence on which the case was tried, and that part of the testimony was not taken down in writing, the appeal must be dismissed.

Appeal by the defendant from a judgment of the District Court of the First District, *Buchanan* J.

The certificates of the judge and clerk of the lower court stated, that the record contained all the testimony adduced on the trial, except the testimony of one witness, 'which was not taken down in writing.'

Garland, J. This suit was commenced by a writ of attachment on an accepted bill of exchange. From the certificate of the judge and clerk of the inferior court, it appears that all the evidence upon which the case was tried, is not contained in the record. In conformity with the well settled practice of this court, the case cannot be tried on the merits, and the appeal must be dismissed with costs.

Chinn, for the plaintiff, prayed for a confirmation of the judgment, with damages for a frivolous appeal.

Josephs, for the appellant.

William A. Bartlett v. The New Orleans Canal and Banking Company.

Every note issued by a bank, promising to pay a given sum on demand, is a distinct and separate promise.

The penalty, provided by the twentieth section of the charter of the New Orleans Canal and Banking Company, which declares that if the company shall suspend or refuse to pay any of its notes, deposits, or other obligations in specie, that the party may recover interest at twelve per cent a year from the time of such suspension or refusal, cannot be recovered without a demand and failure to pay on the part of the company; and such interest can only be recovered from the time of the demand and failure.

The neglect or refusal by a Bank to pay its notes in specie, is only a *passive* violation of its contracts; and the mere announcement of its intention not to pay notes in specie, by a resolution suspending specie payments, cannot, consequently, be considered an *active* violation of its contracts.

APPEAL from the judgment of the Parish Court of New Orleans, *Maurian*, J.

Devall, for the appellant.

C. M. Conrad, and *F. B. Conrad*, for the defendants.

BULLARD, J. This is an action against the New Orleans Canal and Banking Company, to recover the amount of certain bank notes, together with twelve per cent interest thereon, since the general suspension of specie payments, in October, 1839. The notes in question were presented for payment by a notary public, on the 1st of February, 1842, who demanded the principal together with the interest, as above stated, which was refused as to the interest, but the principal was tendered in legal coin, and refused.

There was judgment for the plaintiff for the principal sum, but without any interest or costs, and he has appealed.

The clause of the charter, under which the plaintiff claims the interest, declares: 'That the said company shall not at any time suspend or refuse payment in current money of the United States of any of its notes, bills, or obligations, or of any money upon deposit; and if the said company shall at any time suspend or refuse payment as aforesaid, the holder of any such note, bill, or obligation, or the person or persons entitled to demand and receive such moneys as aforesaid, shall be entitled to receive interest thereon from the time of such suspension or refusal, until the same shall be fully paid, at the rate of twelve per centum per annum.' Act of 5th March, 1831, sec. 20.

It is admitted that the bank suspended specie payments on the 19th of October, 1839.

We must regard every note issued by the bank, as a distinct promise to pay a given sum on demand; and the charter supplies the penalty, so far as it relates to the bill holder, in case of contravention by postponing, or suspending, or refusing to pay in specie, to wit, an interest at the rate of twelve per cent. If the whole were written on the face of the note, as it exists in contemplation of law, it would appear quite manifest, that the penalty, or damages, or interest could not be recovered without a demand, and failure to pay on the part of the bank, and that only from the putting in default. Such is the general rule, and the words of the charter do not make

this an exception. It is only on demand and refusal, that the bank is put in default, as it relates to particular notes.

But it is contended on the part of the plaintiff, that the bank, by a general suspension of specie payments, committed an active violation of its contract, and was in default *ipso facto;* and he relies on article 1926 of the Code. The article preceding, defines what is an active violation of a contract. It consists in *doing something inconsistent* with the contract; and a passive violation consists, in not doing what was covenanted to be done. The article relied on then provides, that when there is an active violation of the contract, damages are due from the act of contravention, and the debtor need not be put in default; and the succeeding article declares, that when the breach has been passive only, damages are due from the time the debtor has been put in default. According to these definitions, it would seem that the non-performance of what was covenanted, that is, not paying in specie, was merely a passive violation of the contract, unless a general notice, beforehand, of the intention of the bank not to pay, is to be considered as an active violation. If the neglect, or refusal to pay in specie, be only a passive violation, it is difficult to understand, how the mere announcement of an intention on the part of the bank not to pay, can be regarded as an active violation. It does not appear, but that these very notes would have been paid, if sooner demanded, as was offered to be done, when they were presented by the notary in the present case.

There is another reason, why the plaintiff should not recover back interest. It does not appear, that he was the owner of the notes, at the time that specie payments were suspended. They may have belonged, at that time, to persons who did not choose to enforce the penalty, or they may have been issued by the bank itself on the very day they were presented for payment by the notary. Such a construction would make the accessary independent of the principal, and authorize the recovery of interest by a person, who does not show himself entitled to the capital. We cannot suppose that the legislature intended to burden the whole circulation and deposits of a bank with an interest of twelve per cent, whether demanded or not. On the contrary, we think, it depends upon the will of the bill holders and depositors, to exact the penalty, or not,

and that their intention to do so, must be evidenced by a demand; and that the interest will run only from such demand and refusal.

Judgment affirmed.

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MARK BOATNER v. SAMUEL SCOTT.

The Register of the Land Office and the Receiver of Public Moneys, acting as a Board of Commissioners for the adjustment of conflicting land claims, under the act of Congress of the 8th of May, 1822, have no power to revoke a certificate of confirmation once granted, nor to revise their own decisions touching the location of such conflicting claims, after rights have been acquired under them.

The act of Congress gives no appeal to the Commissioner of the General Land Office from the decisions of the Board; but he may withhold a patent, when satisfied that a certificate of confirmation has been unfairly obtained, and, perhaps, order a new survey, where the survey presented as the basis of a patent, is shown to vary from the boundaries mentioned in the original title.

A survey of a portion of the public lands, under an order from the Land Office, approved by the Surveyor General, is conclusive, unless it be shown that it deviates from the order.

A judicial avowal or admission by an ancestor, is as binding on his heirs, as it was on himself.

An admission made in the course of judicial proceedings, cannot be retracted to the prejudice of the adverse party.

A copy of a survey, certified by the Register of a Land Office of the United States to be a correct transcript of the original survey in his office, is admissible in evidence. The copy is properly certified by the officer having the custody of the original.

A copy of the certificate of the Commissioners for adjusting land claims in favor of a claimant, certified by the Surveyor General, is inadmissible. It should be certified by the Register of the Land Office.

APPEAL from the District Court of East Feliciana, *Johnson*, J. *Andrews*, and *J. P. Bullard*, for the plaintiff and appellee. *Turner*, and *Lawson*, *contra*.

BULLARD, J. The plaintiff asserts title to a tract of land containing six hundred and four acres and a fraction, which he holds under one Hendry, an actual settler, situated in the St. Helena land district. He gives a minute description of the boundaries, according to a survey under competent authority. He alleges that his

title was derived from the government of the United States, in virtue of several acts of Congress, relative the adjustment of land titles. That a certificate according to law was issued in favor of his vendor, Hendry, together with an order of survey, predicated upon said certificate, and that every legal step was taken to entitle him to a patent for said land. He further represents, that the defendant, well knowing the premises, and intending to injure and defraud him, has intruded without any legal right upon the said land, and is in possession of a considerable portion of the same, and refuses to deliver it up to the petitioner, to his damage five hundred dollars. He, therefore, prays for a judgment for the land, together with damages, and rents and profits.

The original defendant, Samuel Scott, in his answer, denied all these allegations, and alleged that he had a good title to the land possessed by him, derived from the government of the United States, by virtue of several acts of Congress, which was duly and legally located by the proper tribunal, constituted by the said acts of Congress, and by their order of survey, dated the 1st of April, 1828. He expressly denies that the said tribunal has any right to alter, or change the said location, by any subsequent act. He, therefore, prays for a judgment for his claim of six hundred and forty acres, as located according to the said order of survey.

The original defendant died *pendente lite*, and his heirs were made parties. The suit was brought in 1833, and finally the heirs of Scott filed a new answer, in 1841, in which, after denying the plaintiffs' title, they allege that in the original order of survey, upon which their ancestor relied, the Board of Commissioners at St. Helena erred, and that since his death his widow, in behalf of herself and her minor children, has, by regular and legal proceedings, had the error corrected, and a new order of survey issued, and a survey and location made which conforms with the plat of survey made under the order of court. They further say, that they and the plaintiff, since the death of the original defendant, have contested their respective pretensions before the Board of Commissioners at the Land Office in St. Helena, and that a final decision has been rendered, establishing the boundaries above set forth, and confirming them in their right to the land contained in said boundaries. They aver that this decision of the Commissioners, and the new

survey, duly made in conformity thereto, are conclusive upon the parties.

The present defendants further pleaded the prescription of ten years. There was a verdict and judgment for the plaintiff, and the present defendants have appealed.

The evidence of title to the *locus in quo*, exhibited by the plaintiff, consists in a certificate of the Commissioners at St. Helena, in favor of Micajah Hendry, for a section of land, as an actual settler, dated November 5th, 1819, an order of survey directing in what manner it shall be located, given by the same authority, dated April 2d, 1828, and a survey made in conformity to the order and duly approved, together with a sale from Hendry to the plaintiff.

The defendants' original order of survey bears the same date with that of the plaintiff, and there is a note or *postscriptum* to each, declaring that the land be equally divided between Hendry and Scott. It appears that there was a confliction and dispute as to the location of the land claims, and that the Commissioners settled it by giving to each an order of survey, with the above proviso. Afterwards, and even after the first answer was filed, the present defendants applied to the Commissioner of the General Land Office, to have the first order of survey, and the survey under it, annulled. In their petition, or *caveat*, they represent, that on the 1st of April, 1828, an order of survey was granted to their ancestor, Samuel Scott, by which he was deprived of a material part of his improvements, and dwelling house, and denied his proper quantity of land, although there is adjoining the conflicting claims unappropriated lands sufficient to give to both their full quantity. They complain, that the decision of the Commissioners, and the amendment thereto, are illegal: 1. because Scott, being the first settler, had a preference in the location, and had always claimed a particular point to which the northern line should run eastward, and by which Hendry, the original settler, had agreed to be bounded; and because the Commissioners ought to have decided, that Boatner had intruded upon the claim of Scott: 2. because the Commissioners violated the act of Congress, which requires, in cases of conflicting claims, where no conditional lines have been agreed upon, that an equal division should be made of the land claimed, allowing each party his improvements: 3. because the Commissioners should have included

the vacant land, so as to allow the legal quantity: 4. because a particular line had been acquiesced in by Boatner's vendor, and pointed out to Boatner as his line.

The Commissioner of the General Land Office referred the case to the Commissioners at St. Helena. In his letter to them, he says, 'from an examination of the papers, I think, that it will be advisable for you to investigate the subject fully, after notifying Mr. Lawson, and the parties interested, of the time when you purpose commencing such investigation, and upon its completion you will transmit *the testimony* to this office, accompanied by a report, and your views upon the case.'

The Commissioners reported, that after investigation they were satisfied, that there was a line agreed upon between Hendry and Scott, which had been disregarded by their predecessors in their order of survey of the two conflicting claims. Thereupon, the case was sent back by the Commissioner of the General Land Office, with the remark, that 'as the law expressly vests in you the power to determine the matter in question, this office, *without expressing any opinion* in the case, requests that you will give such directions respecting the claims of Scott and Boatner, as your judgment, after a full examination of all the testimony, shall dictate, and that you will give the requisite orders respecting the surveys, as soon as practicable.'

In pursuance of these instructions, the new Commissioners of the Land Office at St. Helena, on the 1st of April, 1839, confirmed the views of their immediate predecessors, and ordered that the boundary line between the parties should be established accordingly, and that the claim of Scott should be extended to the hollow ravine, or half mile post, west of the old school house, as marked by a black line on the diagram of Phillips' plat of survey, under the order of the court, and that the claim be surveyed accordingly.

Thus it appears, that, pending the present suit, between 1833 and 1840, a proceeding has been carried on, contrary to the protestations of the plaintiff, the result of which has been to change very materially the relative position of the parties. At the inception of the suit, the two claims had been adjudicated upon by the Commissioners as conflicting ones, so far as it concerned their location, and the Commissioners had ordered their survey and location in a particu-

lar manner. The defendant, Scott, in his original answer, had relied upon that location under the order of survey, and the plaintiff still urges, that it is conclusive. The present defendants now insist upon the new location, under the late decision of the Commissioners. This part of the case, therefore, presents two questions, which have been discussed, to wit: 1. Whether the location first made under the order of survey, could be annulled and set aside, either by the Commissioners themselves, or by the Commissioners of the General Land Office? and 2. Whether the defendants are not precluded from setting up any other location, after relying in their answers upon that which was made under the original order of survey, and decision of the Commissioners?

I. We will premise, that it appears clear to us, that the location of the two claims of Scott and Hendry were ordered, in 1828, after hearing both parties, and in virtue of the act of Congress, which authorizes the Commissioners to decide upon cases of conflicting boundaries. That act of Congress constitutes the Register and Receiver of Public Moneys a tribunal to decide between the parties, in relation to all such claims as conflict or interfere; and it directs them to respect conditional lines, if any exist, and if not, to locate the claims in such a manner as to give to each party his improvements. In the case of *Boatner* v. *Ventris*, and that of *Newport* v. *Cooper*, we had occasion to consider this question, and we concluded, in that latter case, that the Commissioners had no power to revoke a certificate of confirmation once granted. 8 Mart., N. S., 645. 10 La., 160. If their powers be judicial in relation to conflictions, it is difficult to conceive, how, upon general principles, they can, long after rights have been acquired under their adjudications, revise them. If they are without authority to revoke or annul a certificate of confirmation, how can they reverse their own decision touching the location of conflicting claims? No such power is expressly conferred by the act of Congress, nor does it appear that any right of appeal is given to the Commissioner of the General Land Office. He has a right to withhold a patent, whenever he is satisfied that a certificate of confirmation has been unfairly obtained, and, perhaps, to order a new survey in certain cases, whenever the survey, presented as the basis of a patent, is shown to vary from boundaries called for in the original title.

But it does not appear that the Commissioner, in this case, assumed to set aside the orders of survey first given. He referred the whole matter to the Register and Receiver; and the latest communication from that officer, of the 17th February, 1840, shows, that patents are withheld from both claimants, until the matter shall have been finally settled, and that the last decision of the Board has not been approved.

It is, however, contended, that the original decision of the Register and Receiver was a nullity, and that the postscript was added afterwards, *ex parte*. Even admitting, that the postscript, explanatory of the views of the Board, that the land should be equally divided, regard being had to the improvements made by the parties respectively, ought to be rejected, as not making a part of the decision, it is yet to be shown that the decision itself is void, or even voidable. The order of survey lays down specific boundaries, courses, and distances, and it is not shown that the improvements, as they existed at that time, were disregarded. The survey made under those orders, and approved by the Surveyor General, is conclusive, in our opinion, unless it be shown that it deviated from the order, which is not pretended. The land of the plaintiff was surveyed, and located by competent authority, in conformity to the order of survey, and was duly approved by the Surveyor General in 1832. That survey does not appear to have been set aside by the Commissioner of the General Land Office, and it is not pretended that it varies from the order and decision of the Board of Commissioners, although no patent has yet been issued, in consequence of the *caveat* of the defendants.

II. But even if these views should be erroneous, and supposing the matter still subject to the discretion of the Commissioners of the General Land Office, so far as the government is concerned, the other question presents itself, to wit, whether the present defendants are not concluded by the answer first filed? We have seen that the original defendant relied expressly upon his location, under the order of survey of the 1st of April, 1828, and even denied the authority of the Commissioners, to alter or change thelocation, by any subsequent act, and that he prayed for judgment for his land, as located according to that order of survey.

It is hardly necessary to say, that the judicial avowal or admis-

sion of the ancestor is as binding on his heir, as it is upon himself. It is equally clear, that an admission, made in the course of a judicial proceeding, cannot be retracted to the prejudice of the adverse party. The original defendant set up title under his certificate of confirmation, and the location of it in conformity to the order of survey, and his heirs cannot now be permitted to gainsay his averments, and avail themselves of proceedings wholly inconsistent therewith.

We proceed to notice the bills of exceptions, taken by the defendants and appellants, during the progress of the trial.

The first was taken to the admission of a copy of a plat of survey, certified by the Register of the Land Office to be a correct transcript of the original survey in his office. It was objected to on the ground, that it ought to have been certified by the Surveyor General, and not by the Register of the Land Office; and, that it did not correspond with the description of the land given in the petition, and was not in conformity with the order of survey. The court, in our opinion, did not err. The copy was properly certified by the officer who had certified, and had, we presume, the custody of the original survey. The effect of the survey, and whether it proved a location according to the order of the Commissioners, were proper enquiries for the jury; and not to be decided by the court, in that stage of the proceedings.

The exception to the admission of the copy of the Commissioners' certificate in favor of Hendry, was, in our opinion, well taken, the copy being certified, not by the Register of the Land Office, but by the Surveyor General. The record, however, furnishes abundant evidence of the existence of such a certificate, independently of this informal copy. It is admitted in the present defendants' correspondence with the department, and in the evidence emanating from the land office at St. Helena. The admission, therefore, of the copy, did not influence the decision of the case.

The other questions of practice, appear to have been correctly decided; and the charge to the jury, which was objected to, appears to us not to have misled them upon the matters submitted for their decision.

It appears to us, on the merits, as it did to the jury, and the court below, that the plaintiff has shown the best legal title to the

land described in his petition; and that the location of it, conformably to the first order of survey, is conclusive between the parties.

Judgment affirmed.

JAMES CALLAWAY *v.* BENJAMIN WEBSTER.

A supplemental answer, filed without leave of the court, or of the plaintiff, will be disregarded.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted, without argument, on the points filed by *Sterrett*, for the plaintiff, and *Durell*, for the appellant.

MARTIN, J. The plaintiff claims certain arrears of rent from the defendant, his lessee, and the cancelling of the lease. The defendant pleaded the general issue, and, in a supplemental answer, alleged that the premises were in a dilapidated state; that it became necessary to repair them; and that the plaintiff, as well as the persons from whom he holds, refused to be at any expense therefor; whereupon, he effected there pairs at his own expense, and he claims their value in reconvention. The plaintiff recovered three hundred and seven dollars, and the lease was cancelled. The defendant appealed. His counsel has contended, that the judgment ought to be reversed: 1. Because it is not one of non-suit with regard to the claim in reconvention, but has the force of *res judicata* as to said claim. 2. Because no notice was given to the defendant of the day of trial of the suit.* 3. Because no notice was given to the defendant of the day of trial of the suit, after the filing of his supplemental answer. The record shows, that the trial took place in the absence of the defendant, and that his counsel made an unsuccessful effort to obtain a new trial on that score, and on the grounds urged in his favor in this court. It does not appear from any part of the record,

* This was before the act of 10th February, 1841, sec. 16, altering the mode of fixing cases in the District, Parish, and Commercial Courts in New Orleans.

except the notice to the defendant's counsel, that the cause was fixed for trial. That notice, which was served on the 12th, stated that the case was fixed for trial on the 18th of February, 1840. The supplemental answer was filed on the 17th; but it does not appear, that leave was obtained therefor.

It does not appear to us, that the new trial was improperly refused. On the merits, the lease is an authentic one, and no payment of rent is proved. The reconvention was properly disregarded, as it was claimed in a supplemental answer, filed without leave of the court, or of the plaintiff.

Judgment affirmed.

JAMES H. CALDWELL *v.* E. B. COGSWELL and others.

The verdict of a jury on a question of fact, will not be disturbed unless clearly wrong.

APPEAL from the District Court of the First District, *Buchanan*, J.

Sterrett, and *R. M. Carter*, for the appellant.

Larue, and *J. C. Clark*, for the defendants.

MORPHY, J. The petitioner claims $10,000 damages, for injury sustained by him in consequence of the bad and unworkmanlike manner, in which, as he alleges, the defendants executed a contract, by which they undertook to put a roof of zinc on the St. Charles street Theatre, in July, 1835. The defendants admit that they made such a contract, but aver that they have fulfilled their obligations under it, and finished the roof in a good and workmanlike manner; that the plaintiff has failed to comply with his part of the contract, by refusing to pay the stipulated price, and has thereby caused them damages to the amount of $500. They aver that if the zinc roof put on by them has proved defective, and leaked since its completion, the fault is not to be attributed to the materials employed or to the workmanship, but to causes for which the plaintiff alone is accountable, to wit, the unfitness of the building for the reception of a roof at the time that the plaintiff required

it to be covered, the whole edifice having been run up in a great hurry, the walls not having had time to settle down, the windows, doors, and the both gable ends of the house being then open, and not closed up for months after the zinc was laid, so as to allow free ingress to the wind and rain; they also allege that the sheathing of the roof was defective, being of uneven thickness and of bad materials. The answer further avers, that the defendants made objections to the unfitness of the building, and protested against proceeding to cover it in its unfinished state; but that the plaintiff insisted upon the immediate commencement and completion of the work, declaring that the theatre must be ready for exhibitions by a certain time, on account of wagers to a large amount having been made that it should be open on a given day, and stating that he would himself take the responsibility, and bear the loss, should any damage result. The answer sets forth, that soon after its completion, the zinc roof of the theatre was strained and damaged by the settling and spreading of the walls, and by the rushing of the wind through all the openings; and that to repair such damage, the defendants expended in labor and materials $1,500, for which the plaintiff is liable to them; that if any leaking has occurred since these repairs were made, it has arisen from the same causes, as well as from the trampling on the roof by persons employed in finishing the theatre. The answer concludes with a reconventional demand against the plaintiff for the sum of $6,397, the price of the construction of the work according to the contract, the subsequent repairs, and the damages. There was a verdict and judgment below for the defendants, for the sum of $2,500. The plaintiff has appealed.

After commenting on the testimony in this case, the counsel for the appellant has thought proper to remind us, that, notwithstanding our respect in general for the verdicts of juries on matters of fact, we sometimes correct their errors when they are glaring and manifest. This we hold it our duty to do, but in the present instance, it is by no means obvious that the verdict complained of is erroneous. A number of witnesses belonging to the trade of house-building, were examined in court, and under commissions. Their testimony is contradictory. After a careful and minute examination of the record before us, we are unable to see that the

evidence preponderates so strongly in favor of the plaintiff, as to make it imperative on us to set aside the verdict obtained by the defendant, in a case coming so peculiarly within the province of a jury.

Judgment affirmed.

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WAIT WELLS WILSON *v.* CHARLES A. BANNEN.
JAMES P. SWAIN *v.* THE SAME.

Attachment by plaintiff of goods belonging to defendant, in the hands of third persons, who were made garnishees. The latter delivered up the goods, except a part retained to secure an amount due to them, as agents of a ship, for freight of the whole lot. A rule having been obtained by the plaintiffs on the garnishees, to show cause why they should not deliver up the goods retained, the latter suffered it to be made absolute, without objection, and on execution, surrendered the balance of the goods to the sheriff. On a subsequent rule by the owners of the ship, against the plaintiffs, defendant, and sheriff, to show cause why the freight of the whole lot of goods, should not be paid by preference out of the balance last surrendered by the garnishees, *Held:* that the defendant, though without interest in the question of privilege, as between the plaintiffs and the owners of the ship, is interested in defeating the claim of the latter, and may plead prescription against it; that no prescription could run so long as any of the property remained in the hands of the agents of the ship owners, as a pledge for the payment of the freight, such pledge being a standing acknowledgment of the debt; and that it commenced running only from the delivery of the goods to the sheriff, from which time the owners of the ship had fifteen days to assert their privilege for the freight, and one year to urge their claim against the debtor.

Prescription is interrupted, wherever the debtor, or possessor acknowledges the debt, or adverse right, against which it was running.

A ship owner may retain all the goods shipped, untill the whole freight bill is paid. Every part of the goods is liable for the whole debt. Where a part only of the goods shipped have been retained as security, it will be liable for the whole freight.

APPEAL from the District Court of the First District, *Buchanan*, J.

J. C. Clark, for the plaintiffs. No counsel appeared for the defendant and appellant.

Wray, for the appellees.

Morphy, J. A lot of goods, which arrived in this city in the ship Ocmulgee, in the autumn of 1838, was attached in these suits. Bein and Cohen, agents of the New Orleans and Louisiana line of ships, to which the Ocmulgee belonged, were made garnishees. The goods levied on were sold, with the exception of one hundred and five kegs of nails, which were retained by the garnishees, to secure the payment of the freight due on the lot of goods. Long subsequently, the plaintiffs ruled the garnishees into court, to show cause why they should not deliver up the one hundred and five kegs of nails, which they had refused to do, or, in default thereof, pay the full amount of their respective judgments. Instead of appearing and showing their lien on the property, the garnishees suffered the rule to be made absolute against them. On the execution issued against them, they delivered to the sheriff the one hundred and five kegs of nails, on the 15th of January, 1840. On the 29th of the same month, Thomas J. Leavitt, and others, owners of the ship Ocmulgee, took a rule on the plaintiffs, the defendant, and the sheriff, to show cause why they should not be paid by preference and privilege, the freight on the goods originally attached, amounting to $328 61, out of the proceeds of the one hundred and five kegs of nails delivered up by their agents, Bein and Cohen, in conformity with the order of the court. On this rule, there was a judgment below in favor of the owners of the ship, from which the plaintiffs and defendant in these suits have appealed.

On the trial of the rule, the attorney appointed to represent the absent defendant, Bannen, filed a written answer, pleading the prescription of one year against the claim of the third opponents. This was objected to by the latter, on the ground that the defendant had no interest in the property in dispute, and could not make such a plea. The defendant was, perhaps, without interest in the question of privilege to be debated between the other parties to the rule, but surely it cannot seriously be contended, that he was not interested so far as the establishment of the debt was concerned. If he succeeded in defeating the claim, it would be so much more paid to the plaintiffs in discharge of their judgments against him. The plea was, therefore, properly admitted, but we can see no difficulty in disposing of it. Prescription is interrupted, and ceases to run, whenever the debtor, or the possessor acknowledges the debt,

or the adverse right, against which it was running. Civ. Code, art. 3486. This acknowledgment may be express or implied. In this case, it is of the latter character. As long as the one hundred and five kegs of nails remained in the hands of the owners of the ship, or their agents, as a pledge for the payment of their freight, no prescription could run, because the pledge was a standing acknowledgment of indebtedness on the part of the defendant, Bannen. It began to run only from the delivery of the goods to the sheriff, and from that time, the owners of the ship had fifteen days to assert their privilege on the property, and one year to urge their claim against their debtor. Civ. Code, arts. 3213, 3499. 2 Troplong on Prescription, Nos. 534, 618, and 628.

It has next been urged, that, at all events, the privilege claimed should be allowed only for the freight due on the one hundred and five kegs of nails, retained by the garnishees, or agents of the owners of the ship. To this we cannot listen. The latter had the right of retaining all the goods to answer for the freight bill, and each and every part of such goods was liable for the whole debt. They were not bound to surrender any part of them until their bill was paid, or satisfactory security given. Instead of doing this, they retained only such a portion of the goods, as they supposed to be sufficient to secure their debt. It must, therefore, be liable for the whole freight. Civ. Code, arts. 3130, 3131, and 3138.

Judgment affirmed.

Succession of Charles Pollet.

An applicant for the curatorship of a succession, is not bound to state in his petition to the Court of Probates, the grounds on which he claims the appointment, as the first applicant is entitled to the curatorship, unless legally opposed. In case of opposition, he may show, in a supplemental petition, the grounds of his claim.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Biron, for the appellant. No counsel appeared for the appellee.

Martin, J. Joseph Perillat applied for the curatorship of the estate of Pollet, stating that he was a creditor, and that the value of the estate did not exceed five hundred dollars; and he founded his application on the act entitled 'an act supplementary to the art. 1178 of the Civil Code.' He was appointed accordingly; but discovering that he had been under an error as to the value of the estate, he made a second application, in which he did not claim the curatorship as a creditor. Publications having been ordered, Camille Rizzo filed an opposition to his appointment, on the ground that he, Rizzo, was a creditor, and ought to be preferred to Perillat, who was not. On this, Perillat filed a supplemental petition, averring himself to be a creditor, and his opposition to Rizzo's appointment, averring that the latter was not a creditor. Perillat was appointed, and Rizzo appealed.

Rizzo's counsel has contended, that the appellee, not having claimed the curatorship in his first petition as a creditor, could not alter his claim, and urge it in that capacity in the second petition. The law does not require the applicant for a curatorship to state the grounds, on which he claims it; for the first applicant is entitled to it, unless a legal opposition be made. On the opposition of the appellant, the appellee had an undoubted right to show, that the former had no better right than himself, to wit, that both were creditors. The testimony shows, that the applicant and opponent are both creditors of the deceased, and of the estate, for very trifling sums.

The judge, in our opinion, correctly granted it to the former.

Judgment affirmed.

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Felix Maxan v. His Creditors.

The syndic of the creditors of an insolvent is entitled to a commission on the proceeds of the sale of the mortgaged property, though purchased by the mortgagee, who retains the price in discharge of the mortgage debt.

The syndic of the creditors of an insolvent is entitled to the same commission, where the cession of property was made by a creditor in actual custody, as in cases of voluntary surrender under the act of 1817.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

C. M. Randall, for the appellant.

Castera, for the syndic.

Martin, J. Edward Hall Barton, a creditor of the insolvent, is appellant from a judgment overruling his opposition to a charge in the tableau of distribution of three hundred and fifty nine dollars, and thirty two cents, for commission to the syndic, Gabriel Wartelle. The sole question, which this case presents, is, whether a syndic is entitled to his commission on the proceeds of the sale of mortgaged property, when it is purchased by the mortgagee, and he retains the price, which finally remains in his hands, in discharge of the mortgaged debt? The first judge has solved this question in the affirmative, and it does not appear to us, that he erred. There could be no doubt of his right to the commission, if the premises had been adjudged to any other person than the mortgagee. The adjudication to the latter authorized him to retain the price, and the homologation of the tableau of distribution showed that he was not bound to restore the price, nor any part thereof. The appellant's availing himself of the right, which the law gave him, to retain the price, ought not to place the appellee in *duriori casu*. It is true, that it relieved the latter of the trouble of receiving the price, and of repaying it; but it also relieved the appellant from the numeration of the money twice, and it afforded him the use of it between the sale and the homologation of the tableau. The appellee's trouble and responsibility, if they were at all diminished, were so for the exclusive benefit of the appellant.

The insolvent was in custody; and this circumstance is presented to us as one, which ought to debar the syndic from his claim to the commission, because, although the law expressly allows a commission to the syndic in ordinary insolvencies, it is entirely silent on

that head as to cases in which the insolvent is incarcerated. This argument, in our opinion, borders very much on absurdity. The laborer is worthy of his hire. The reason is the same in one kind of insolvency as in the other, and the law ought not to differ. *Ubi eadem est ratio, eadem est lex.*

Judgment affirmed.

FREDERICK FREY and another *v.* MAURICIO HEBENSTREIT and another.

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Bail not fixed with the debt before the passage of the act of the 28th of March, 1840, 'to abolish imprisonment for debt,' were discharged by that act.

The act of the 28th of March, 1840, having abolished the *capias ad satisfaciendum*, no such writ could be executed, though in the hands of the sheriff at the time of the passage of the act.

A sheriff cannot be made liable for failing to return a *capias ad satisfaciendum*, where the writ was abolished before the return day.

The 19th section of the act of 10th February, 1841, cannot revive the responsibility of bail previously discharged by the act of the 28th of March, 1840.

The execution of an obligation may be suspended, but the obligation itself cannot. Where the obligation has once ceased to exist, it can only be revived in the manner it was created.

The condition of a bail bond, that the defendant shall not depart from the state without the leave of the court, is modified by the provision of art. 230 of the Code of Practice, that 'one who has become surety that another shall not depart from the state, or leave the jurisdiction of the court by which the order of surety was granted, may be discharged from all responsibility by surrendering to the sheriff the person of the debtor.'

Bail will be discharged, where the surrender of the debtor becomes impossible by the act of God, as in case of the death of the debtor; or is rendered vain and useless by the act of the law, as in case of the abolishment of imprisonment for debt.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

C. M. Conrad, for himself, and the other appellant. The bail bond is, *in its terms*, a positive obligation to pay a sum of money, on a certain condition, which condition, it is admitted, has occurred.

But according to the principle laid down in *Jayne et al.* v. *Cox*, 8 Mart. N. S., 168, the surety, even after the occurrence of the condition, may discharge himself by surrendering the debtor. The obligation is, therefore, one with a resolutory condition, Civ. Code, art. 2040; or, viewing it in the light most favorable to the surety, is an alternative obligation. Ib., art. 2061. Pothier, Traité des Obl., No. 250. Viewed in either light, if the condition by which the obligation of the surety was to be discharged has not occurred, he remains bound; or, if prevented from fulfilling one obligation, though without his fault, he still remains bound to fulfil the other. Civ. Code, art. 2066. Pothier, Traité des Obl., 251.

It is contended, that the surety was discharged by the law of 1840, because it put him *in duriori casu*. To this I answer:

1st. That supposing such to be the fact, a law making his condition worse, ought not to be construed to make it better; a law depriving him of *one* out of *two* modes of discharging a debt, ought not to be construed to extinguish the debt altogether.

2d. That the law of 1840 did in no manner interfere with the surety. The writ of *capias ad satisfaciendum* was of no use to him. It could only be issued after *judgment*, and on behalf of the creditor.

Arts. 230, 231, and 233 of the Code of Practice enumerate the only remedies afforded to him, and the abolition of the writ of *capias ad satisfaciendum* does not repeal, nor in any manner affect those articles. As the act of 1840 does not abolish *imprisonment for debt generally*, but only a particular writ, it is by no means clear, that a party surrendered by his bail, under the arts. 230 and 233, would be entitled to a discharge under that law. Some confusion has arisen in regard to this matter, by the application of *common law decisions*, to the cases of sureties on the bonds given by defendants *arrested under the provisions of the Code of Practice of this state*. That there is some analogy between the two remedies, is admitted; but that they are precisely similar, is denied. At common law the defendant may be held to bail *in any case*, without an affidavit that he is *about to leave the kingdom*. 3 Blackstone, 287. Comyn's Dig., *verbo* Bail, 9, 2. The condition of the bond is for the defendant's appearance at the return of the *writ*, not that he shall not leave the *kingdom without leave of the*

court; and, as a consequence of this condition, if prevented from fulfilling the principal obligation by uncontrollable events, such as death, &c., the bond is not forfeited. But here the obligation is that he shall *not do a certain act*, which act must, from its nature, be *voluntary*, and can be brought about by no *uncontrollable event*. The right of the debtor to surrender himself, or of his surety to surrender him, in discharge of the bond, is a privilege given to them; it is a mode of discharging their obligation; and if, by any circumstance, they are deprived of the power to do so, it is their own fault, inasmuch as all responsibility might have been avoided had the defendants not choson to leave *the state without leave of the court*. This court has repeatedly decided that the application of common law terms to writs, or process provided by our statutes, does not necessarily imply that the remedy itself, with all its incidents, was intended to be introduced. 7 Mart., N. S., 16. 8 Ib., 315. But here, the word has not been introduced. The words '*bail*,' or '*bail bond*,' do not occur in our laws, as applicable to civil actions. In regard to criminal matters they are used, and very properly, as the condition of the bond in *criminal cases*, is precisely what it is in all cases at common law, to wit, *for the appearance of the defendant;* and if the defendant do not *appear*, the bond is forfeited, whether he have *left the state* or not.

Whatever may have been the case prior to the law of 1841, there can be no doubt since the passage of that act. Whether this act be viewed as declaratory of the *meaning* of a previous law, or as a *modification* of that law, it is equally binding on this court. In other words it is a *law*, unless it be unconstitutional. In what respect is it unconstitutional? So far from *impairing the obligation of contracts*, it is intended to enforce them; to restore a remedy, which, if taken away at all, had been taken away through inadvertence. Is it unconstitutional, because it is retroactive? I have yet to learn that retroactive laws, which do not *impair the obligation of contracts*, are unconstitutional.

The Supreme Court of the United States has, in several instances, recognized the constitutionality of state laws which have gone much further than to apply remedies to past contracts, and have even declared contracts, that had become null and void, valid and binding. 2 Peters, 401. 9 Ib., 88. 11 Ib., 420. There is

not one argument which goes to show that the law of 1841 is unconstitutional, or that it attacks vested rights, which does not apply with much greater force to the law of 1840.

It has been said, by one of the counsel for the defendant, that the question is, whether a party who has been *discharged* from his contract can be again made responsible by legislation? This is not a proper statement of the question. The parties to the bond have not been *discharged*. The legislature have not said so. It was not in the power of the legislature, to *abrogate or abolish a contract*. All that the law of 1840 did, even according to the interpretation given to it by this court, was to repeal a remedy. If the legislature could abolish a remedy, could it not restore it? Suppose, that instead of abolishing the writ, the legislature had temporarily suspended it, as it has done, in effect, would it be contended, that such a temporary suspension of the remedy, absolutely released the debtor? Suppose, that instead of abolishing a particular writ, the legislature had gone further, and temporarily suspended all judicial proceedings, as was done in 1814, will it be pretended that the effect of such a law would be to discharge debtors, or their sureties. But in point of fact, it cannot be said that, in the present case, there has been even a temporary suspension of the rights of the creditor. While the law of 1840 was in full force, the plaintiff was not in want of the writ of *capias ad satisfaciendum*, and before the proceedings had gone so far as to enable him to resort to that writ, the law of 1841 had been passed; so that, as to him, the law of 1840 was always a dead letter.

The decisions heretofore rendered by this court, are not opposed to these views. The court has never pretended that the *contract* was '*abrogated and abolished*.' It has proceeded on the ground that the surrender was an useless formality; but this may be doubted, for *imprisonment for debt generally*, was not abolished by the law of 1840, but only the writ of *capias ad satisfaciendum*. If the debtor were brought within reach of the process of our courts, or if he had never left it, he might be arrested, and detained in prison for three months. At all events, the surrender is no longer useless since the act of 1841; and, consequently, the decision is inapplicable.

G. Strawbridge, and *D. Seghers*, for the bail.

MARTIN, J. Charles M. Conrad, and George Eustis, assignees of the judgment recovered by the plaintiffs in this case, are appellants from the discharge of a rule which they had taken on M. S. Cucullu, bail of Francisco Lojero, one of the defendants, to show cause why judgment should not be rendered against him. Imprisonment for debt having been abolished by the legislature of the state, by the act of the 28th of March, 1840, p. 131, it has been frequently held by this court, that all bail not fixed with the debt at that period, were discharged. In the case of *Cooper* v. *Hodge et al.*, 17 La., 476, we held that the bail was released although a *capias* was in the hands of the sheriff at the time of the passage of the law, upon the return of which *non est inventus*, the creditors sought to make the bail liable on the bond. In *Borgsted & Co.*, v. *Nolan et al.*, Ib., 593, we held that the bail could not be made liable, where no *capias ad satisfaciendum* had been issued before the passage of the law, as none could be issued afterwards; and as it was only upon the return of such a writ, that proceedings could be had against the bail. In *The Atchafalaya Bank* v. *Hozey*, Ib., 509, we decided that the sheriff could not be made liable for failing to return a *capias ad satisfaciendum*, if the writ was abolished before the return day. The appellants, however, have contended, that they are entitled to relief, under the act of the 10th of February, 1841, sec. 19, which provides, that 'for the purpose of fixing the security on bail bonds, the writ of *capias ad satisfaciendum* shall remain in force.' As the appellee was discharged by the former act, it cannot be seriously asked of us to say that the latter act restores his responsibility. The execution of an obligation may be suspended, but the obligation itself cannot. If it cease to exist, it cannot be revived, except in the manner in which it was created. The judge *a quo* has held, that 'the attempt to cloak the intention to restore the liability of the bail, by giving to the section of the act of 1841 the form of an interpretation, construction, or declaration of the meaning of the law, cannot avail; it would be a violation of the first principles of justice. The act of 1840 may justly be characterized as a freak of legislation, but as it is within their constitutional power, however contrary it may be to a just spirit of legislation or jurisprudence, it must be submitted to.'

To the correctness of the legal principles asserted by the judge

a quo, we give our assent; but we do not concur in the reflection cast upon the legislature, for passing the act abolishing imprisonment for debt, in 1840.

The appellants have, moreover, contended, that they are entitled to judgment on the bond, on an assignment of a breach of one of its conditions, to wit, the debtor's departure from the state without the leave of the court. This is modified by an article of the Code of Practice, which provides, that 'one who has become surety that another shall not depart from the state, or leave the jurisdiction of the court by which the order of surety was granted, may be discharged from all responsibility, by surrendering to the sheriff the person of the debtor.' Art. 230. In the case of *Wakefield* v. *McKinnell*, 9 La., 449, we held that the bail is discharged, when the surrender becomes impossible by the act of God, as by the death of the debtor. We must now hold as a corollary, that he is discharged when the surrender becomes vain and useless by the act of the law, as where, by an act of the legislature, the imprisonment for debt is prohibited. *Lex neminem cogit ad vana seu impossibilia.* In the latter case, the bail is no longer bound to surrender the debtor, because the surrender would be *vain*, as the debtor could not be retained in custody. In the former, we held, that the bail was no longer bound to surrender, because the surrender had become *impossible.*

Judgment affirmed.

ROBERT C. ARMISTEAD and another v. JAMES WALTON SPRING.
MATTHEW JARVIS and another v. ROBERT C. ARMISTEAD and others.

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An entry in the books of a partnership, made at the time of the transaction, will be conclusive between the parties, unless shown to be erroneous. The partners were the mutual agents of each other, and such an entry must be regarded as an account rendered of the transaction.

Defendant sold to one of the plaintiffs his interest in a partnership, the latter taking his place in the house, and assuming the partnership debts, but not the private debts of either of the partners. In an action by the new house, against the retiring partner, for the amount of his private account with the old firm: *Held*, that the new partner taking the place of his vendor, can have no greater rights than the latter; that each of the original partners having a private account with the firm, the one necessarily extinguished the other *pro tanto*, and that the difference between the two, forms a balance due from one partner to the other, to be adjusted on the final settlement of the concern; and that, by the effect of the sale, the private account of the retiring partner, became that of his successor.

A claim which a party has failed to establish in a direct action, cannot be set up by way of exception in another.

ARMISTEAD and Otto have appealed, in the first of these cases, from a judgment of the Commercial Court, *Watts*, J., and in the second, from a judgment of the City Court of New Orleans, *Thomas J. Cooley*, J.

G. Strawbridge, for the appellants.

Benjamin, contra.

BULLARD, J. These two cases have been argued together, as the causes of action arise out of the same transaction. The facts are these. R. C. Armistead and J. W. Spring were partners in trade, and about the 1st of January, 1840, Spring sold to Jacob A. Otto, his share in the concern, and Otto became a partner of a new concern, under the firm of Armistead and Otto, successors of Armistead and Spring. In consideration of this transfer, Armistead and Otto gave sundry notes to Spring, and, among others, the one on which Jarvis and Andrews, as endorsers, sued in one of the cases now before the court; and Otto, thus becoming a partner in the place of Spring, bound himself to pay and satisfy all the outstanding debts and liabilities for which Spring was bound as a member of the firm, it

being expressly stipulated, that the parties were only bound to pay the partnership debts of Armistead and Spring, and not the private debts of either of the partners. The other suit is brought by Armistead and Otto, against Spring, the plaintiffs alleging that Spring was himself indebted to the partnership in the sum of $1050 35, the balance of his private account with the firm; and that in the month of May, 1839, he had received from Durand, of Mobile, $2,500 belonging to the firm, for which he had not accounted. They allege other dealings, and an indebtedness on the part of Spring, to the amount of $4,579 12.

The Commercial Court gave judgment in favor of Armistead and Otto, for a small amount paid for Spring since his assignment to Otto, and they have appealed.

In the other case, in the City Court, on one of the notes, Armistead and Otto set up in defence and reconvention the same matters which formed the basis of their direct action in the other case, to wit, the indebtedness of Spring on his private account; and this plea having been overruled, and judgment rendered in favor of the plaintiffs, the defendants, Armistead and Otto, have appealed.

The principal matter of contention in the first case, is an item of $2,500, for a lot of merchandize sent to Mobile, the proceeds of which, it is alleged, were received by Spring, previously to his transfer to Otto, but of which he has never rendered any satisfactory account; and for that amount, it is contended he is indebted to the plaintiffs. To this, it is replied, that if that amount was taken out, it was afterwards returned, as appears from an entry in the books, which balance, so far as that transaction is concerned; that although neither party can explain, at this time, what disposition was made of the sum, it appears from the books, that it was employed for the benefit of the concern, and that the entry in the books is evidence between the parties. We are of opinion that the entry in the books, made at the time, is *prima facie* evidence in favor of the partner, who personally transacted the matter; and that unless error be shown, he cannot be charged with the amount as a private debt due to the firm. The presumption is clearly in his favor, and more especially as both parties had equally access to the books, and they appear to have been afterwards balanced. The parties, at the time, were the mutual agents

of each other, and the entry made in the books must be regarded in the light of an account renderd of the transaction; and although, at this time, neither party can recollect whether the proceeds of the Mobile adventure were reinvested in other goods, or converted into money and blended with other sums belonging to the firm, or employed in the payment of debts, it is not just to infer, that the entry in the books was false, without any further evidence, and that the money was converted to the separate use of the defendant.

Another sum claimed in this suit, is the private account of Spring with Armistead and Spring, while he was a partner. It is not easy to conceive how the plaintiffs can recover this item. Otto, the assignee, according to the contract, takes the place of Spring in the concern. As assignee, he can have no greater right than his assignor. His pretensions pass *cum onere*. The assignee takes his place relatively to his partner. What was that position? Each had a private account with his firm. The difference between the two accounts, would be a balance due by one partner to the other, to be adjusted on the final settlement of the concern. If the retiring partner can be sued for the amount of his private account, why is not the other partner liable for his? Or, in other words, why may not Spring plead in compensation, the debt due by Armistead to the concern at the time of his transfer? One account necessarily extinguishes the other *pro tanto*. By the effect of the assignment, the private account of Spring became that of Otto, to whom Armistead, at the same time, became indebted for his private account with the firm.

The same reasoning which applies to the item of $2,500, is equally applicable to that of the expenses of a journey to New York, which were originally charged to the firm as expenses; and nothing shows that it was erroneously charged, or that the expenses were to have been borne exclusively by Spring.

In the case of Jarvis and Andrews *v.* Armistead and others, it appears by a bill of exceptions, that the defendants offerred evidence to prove their claim set up in the answer, which it will be recollected, was the same that was sued for in the case of Armistead and Otto *v.* Spring, then pending. The evidence was refused, on the ground: 1st, that the claims were unliquidated and

could not be pleaded in compensation; 2d, that it was in controversy in another suit, wherein a judgment had been rendered adversely; and 3d, that the court was without jurisdiction.

The court, in our opinion, did not err in refusing to receive evidence on the second ground above stated. The defendants having failed in a direct action to establish the claim set up by them in this by way of exception, could not turn round and avail themselves of the same matter. The exception of *litis pendencia* was well sustained.

Judgments affirmed.

THE CITY BANK OF NEW ORLEANS *v.* JAMES DESBAN and others.

Defendant stipulated, as part of the price of a lot of ground and certain bank stock, which was to be delivered immediately, to pay a note due by his vendor to the plaintiff; the stock was not transferred, nor the contract cancelled. In an action by the plaintiffs on the note, *held,* that the judgment in favor of defendant should be one of non-suit, as the stock may still be delivered.

APPEAL from the Commercial Court of New Orleans, *Watts,* J.

Micou, for the appellants. There was no privity between the plaintiffs and Toledano. There was a partial failure of consideration. Toledano does not ask a rescission of the sale; and he cannot keep the property, and refuse to pay the price. Should the defence of the appellee be sustained, the judgment should, at most, be one of non-suit.

Pepin, for the defendant, Toledano. 1. The promise of Toledano was conditional, and the consideration having failed, he is not bound. Civ. Code, arts. 1887, 1890, 1891. Pothier, Des Obligations, No. 42. 2. No rescission of the sale could be asked for in this suit; it must be demanded in a direct action against Desban, the vendor. 3. The judgment below was correct. *Chedoteau's Heirs* v. *Dominguez,* 7 Mart., 522. *Applegate et al.* v. *Morgan et al.,* 5 Mart., N. S., 643. *Pritchard* v. *Hamilton,* 6 Ib., N. S., 457.

BULLARD, J.* The plaintiffs are appellants from a judgment in favor of Raphael Toledano, one of the defendants, absolving him from an obligation contracted by him, to pay a promissory note, executed by Desban in favor of Villatte, and upon which the present suit is brought by the indorsees. His defence is, that the consideration of his promise to pay the note, has entirely failed.

It appears, that Desban sold to Toledano a certain city lot, together with forty shares of the stock of the Union Bank, secured by mortgage on the lot, which stock he engaged to transfer immediately on the books of the bank; that, as a part of the price, the purchaser promised to pay the note of his vendor, the same on which this suit is brought. It further appears, that the bank stock has never been transferred according to the contract, notwithstanding many vain efforts to obtain its transfer, and, indeed, that the stock has never been transferred to Desban, himself, who was not possessed of it at the time of the contract.

It is clear, therefore, that the consideration of this *stipulation pour autrui* has partially failed, but it does not appear that the contract has ever been cancelled. Its rescission is not demanded in this suit. It is true, as has been contended by the counsel, that there was, originally, no privity of contract between the appellee and the bank. But the bank was acquainted with the consideration for the promise made by the appellee, Toledano. We think, however, that the judgment should have been one of non-suit, because the stock may hereafter be transferred, nothing having occurred to prevent it, so far as it appears from the record; and, in that event, Toledano may be still bound by his promise.

The judgment of the Commercial Court is, therefore, affirmed with costs; reserving, however, to the plaintiffs, their right to recover hereafter of Toledano, on the completion of his contract relative to the bank stock.

* MORPHY J., being interested, did not sit on the trial of this case.

JOHN GLENN v. LOXLEY H. THISTLE.

Notice of protest to an endorser, living four and a half miles from the town where the note was payable, addressed to him through the post office of that town, which was the nearest to his residence, is insufficient by the laws of Mississippi; *aliter*, under the laws of this state.

To render obligatory, a promise by an endorser to pay a note from which he has been exonerated in consequence of want of notice of non-payment by the maker, it must be shown that the promise was made by the former, with a full knowledge that he had been legally discharged.

APPEAL, by the plaintiff, from a judgment of non-suit by the Commercial Court of New Orleans, *Watts*, J.

G. B. Duncan, for the appellant.

L. Peirce, for the defendant.

BULLARD, J. This is an action against the endorser of a promissory note. The defendant pleads the want of notice of demand and refusal to pay on the part of the drawer, and the failure of consideration between the original parties, under the peculiar jurisprudence of Mississippi. The evidence shows, that the notice was presented and protested for non-payment, at the proper time and place. The defendant lives four and a half miles from Natchez, where the note was payable; and on the morning after the protest, a notice was put into the post office at that place, addressed to him. It was proved, that the defendant was in the habit of receiving all his letters at that post office. Whether this was a sufficient notice to bind the endorser, according to the laws of Mississippi, is the principal question in the case.

We are furnished in the record with an opinion of the Supreme Court of the state of Mississippi, in the case of *Patrick* v. *Beazely*, which was strongly analogous to this. The endorser resided about one mile and a half from the town where the protest was made, and the notice was lodged in the post office, as in the case now under consideration. The notice was held bad. The court cites numerous cases in support of their opinion, and, among others, that of *Clay* v. *Oakley*, 5 Martin N. S. 139, in which this court held that notice to an endorser, put into the post office at Alexandria, addressed to him at the same place, he residing there, was not good. This was previous to the statute of this state in relation to notice

of protest.* The doctrine established by the court of Mississippi, appears consonant to the commercial law, as recognized in several states; and if we regard that decision as evidence of what the law is in the state of Mississippi, we must conclude that the notice of protest was insufficient. But it is contended, that the defendant assured the agent of the plaintiff that there were no offsetts to the note, and promised that it should be paid. This new promise would bind the endorser, if it were shown that he made it with a knowledge that he was legally discharged, for want of due notice of non-payment by the maker. The record furnishes no such evidence; and we conclude, with the court below, that the defendant is exonerated. 12 La. 467. 3 Kent, Com. 113.

Judgment affirmed.

DAVID AIKIN and others *v.* JOHN FREELAND and others.

Damages cannot be allowed, under art. 907 of the Code of Practice, for the delay consequent on an appeal, unless prayed for by the appellee.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted without argument, on an agreement waiving the prayer for damages, by *Peyton* and *J. W. Smith*, for the plaintiffs, *C. M. Jones*, for Freeland, and *L. Peirce*, for the other defendants.

MORPHY, J. The defendants are sued, *in solido*, for two instalments of ground rent, due to the petitioners, for certain lots forming the corner of Notre Dame and Magazine streets, in the city of New Orleans. It is averred in the petition, and proved by the notarial deeds attached to it, that John Freeland purchased the lease of these lots, on the 22d of May, 1835, from the estate of M. De Acebo, and, as a part of the price thereof, assumed, in the place and stead of the deceased, to pay to the plaintiffs the ground rent due on them by the latter, at the rate of one thousand dollars a year, payable semi-annually; that on the 27th of April, 1836,

*Act of 13th March, 1827.

William L. Hodge purchased from Freeland, the lease of the same property, and, for part of the price, agreed to assume the payment of this ground rent, as had been done, by Freeland, and that on the 23d of July, 1838, at a sheriff's sale, Andrew Hodge purchased the lease of the same property, subject to the ground rent, that he still holds it and has regularly paid the rent, except the two last instalments, amounting to one thousand dollars. W. L. and A. Hodge pleaded the general issue. Freeland admitted his indebtedness, but alleged the assumption of his debt by his co-defendants, and prayed that they might be cited in warranty, and that he might have judgment against them, for such amount as he should himself be decreed to pay.

There was a judgment below, *in solido*, against the defendants; and judgment, in favor of Freeland, against his co-defendants, as prayed for.

As no defence appears to have been attempted in the inferior court, and as no points have been made here, we would, without hesitation, have allowed the damages prayed for by the appellees, as for a frivolous appeal, were it not, that by the agreement by which the parties have submitted the case to our decision, the prayer for damages has been withdrawn. Under article 907 of the Code of Practice, we are not to award damages for a frivolous appeal, unless demanded by the appellee.

Judgment affirmed.

Lewis W. Jordan v. Hambright Black.

Non-payment of the costs of a suit, for the same cause of action, previously discontinued, is not sufficient ground for a dismissal; but will justify the defendant in delaying to answer until paid. The exception is a dilatory one. It is not necessary that such costs should have been paid in money; it will be sufficient, if the officers, to whom they were due, acknowledge that they have been satisfied, as the defendant will be thereby discharged from any liability for them.

Where a judicial tribunal of another state has acted finally on a case, the legal presumption is that every thing has been done according to law; and the judgment will be evidence between the parties.

A record from a court of another state, none of the judges of which has the title of Presiding Judge, or Chairman, certified by all the judges, is a substantial compliance with the act of Congress, and will be received in evidence.

Plaintiff having obtained judgment against defendant, for the same cause of action, in another state, offered the record in evidence: *Held*, that an instrument which formed part of the record, and which was used as evidence on the first trial, must be presumed to have been duly proved, and cannot afterwards be objected to.

A conveyance of slaves, in another state, to a trustee, for the use of the owner during her life, and for the purpose of being emancipated afterwards, vests a legal title in the trustee, who may sue in this state to enforce the trust.

A question decided by a competent tribunal of another state, after due proceedings, will not be examined into by the courts of this state.

Judicial tribunals are fully empowered to adopt such conservatory measures, as may be necessary to prevent one, in whose possession property may be, from removing it out of their jurisdiction, and thereby defeating the real owner in the prosecution of his rights.

Appeal from the District Court of West Feliciana, *Johnson*, J.

Boyle, for the plaintiff.

Paterson, curator ad hoc, for the defendant.

Garland, J. The plaintiff alleges that he has the legal right and title to a number of slaves, and that the defendant has illegally removed them from the state of Tennessee, and from his legal custody and control, without having any right or title to them. The claim is based upon a conveyance made by Elizabeth Morgan, the wife of the defendant, previous to her marriage, called a deed of trust, in which it is specified that the slaves shall remain in possession of the grantor during her life, and be emancipated by the plaintiff after her death. The defendant married Elizabeth Morgan on the same day that the deed was executed, and having offered some of the slaves for sale, a suit in chancery was commenced in Tennessee, by the plaintiff against the defendant, to

enjoin him from selling them, or sending or putting them out of his possession during the life-time of his wife, in which suit the title of the plaintiff was alleged, and the character of the trust exposed. The defendant had a judgment before the chancellor, but upon an appeal to the Supreme Court of Tennessee, the judgment was reversed, and a judgment entered perpetually enjoining the defendant from selling the slaves, or in any manner impeding or interfering with the due execution of the trust, and from removing or taking any of them beyond the limits of the state. It is charged, that in violation of this injunction, the slaves have been removed to this state by Black, and an affidavit is made of the fears of the plaintiff, that during the pendency of this suit, the defendant will sell, part with, or dispose of some or all of the slaves in controversy; whereupon they were sequestered, and taken into the custody of the sheriff.

On the trial, the record from the Supreme Court of Tennessee, was admitted in evidence, and the deed of trust formed a part of it. The slaves were identified to the satisfaction of the jury, who returned a verdict for the plaintiff, upon which the court rendered its judgment, that he recover the slaves mentioned, and that they be restored to him for the purpose of enabling him to execute the trust mentioned, according to the laws of Tennessee. From this judgment, the curator *ad hoc* of the defendant, has appealed.

In this court, the defendant has urged various grounds on which to obtain a reversal of the judgment, and the setting aside of the writ of sequestration, even though the judgment should be affirmed.

He first alleges, that the inferior court erred in refusing to dismiss this suit on the exception taken by him, that the costs of another suit, for the same cause of action, which was dismissed, had not been paid. His principal reliance to sustain this objection, is on article 492 of the Code of Practice, and the decision of this Court in 7 Mart., N. S., 361. This court has never held that the non-payment of the costs of a previous suit, which was discontinued, was a sufficient ground of dismissal. It only justifies the defendant in delaying to answer, until the costs are paid. The exception is dilatory in its character. But in this case, we find in the record sufficient evidence that the costs of the first suit have been paid. The sheriff gives a receipt in full for the sheriff's and

jailor's costs, and the jury tax fee, and the clerk says that he has been satisfied. It is true that all these payments have not been made in money, but the officers say that they are satisfied, and the defendant cannot complain, as he is discharged from all liability on account of the costs of the suit instituted by Watkinson, agent of Jordan, against him.

The defendant next urges, that the sequestration should be set aside on the grounds that the affidavit is insufficient, and that the agent had no right to make it. The authorities relied on to sustain this position, are all anterior to the act of the legislature of March 20, 1839. Bullard and Curry's Dig. 19, sec. 16, 154, sec. 6. The affidavit appears to us strictly in conformity to law; and there cannot be a doubt, that the terms of the procuration to Boyle, the agent, who made the affidavit, fully authorized him to make it.

The next objection is, that the sequestration bond is insufficient, as the agent had no power to sign it. We have again looked to the power of attorney, and find that it authorizes the agent to institute such legal proceedings as may be necessary to recover possession of the slaves, and to sign any bond or bonds that may be necessary in the course of the suit, or to effect the object in view. We consider the authority to sign the sequestration bond, ample.

It is moreover urged, that the inferior court erred in receiving in evidence the record of the suit between the plaintiff and defendant in the Chancery and Supreme Courts of the state of Tennessee, as the certificate does not say that it is a full and complete copy of all the proceedings had in the case. Further, that it does not appear there was any citation of appeal, or any evidence that the defendant ever appeared in the said Supreme Court. As to the first objection, the certificate states that the record contains 'a full, true, and complete copy of the bill, and exhibits, the injunction, the answer of the respondent, and the decree of the chancellor in the court below, together with a full, true, and perfect copy of the decree of the Supreme Court in the cause.' This seems to us a very ample certificate; it is at least sufficiently so, to put the *onus* on the defendant to show the probable omission of some material document, or order of court. As to the want of citation of appeal, and of evidence of the appearance of the defendant in

the Supreme Court of Tennessee, we are bound to presume that that tribunal would not proceed to judgment in any case, unless the parties were notified, or appeared. The court say that the cause was argued; and, it appears from the record, that as soon as the decree of the chancellor, dissolving the injunction was rendered, an appeal was demanded, and that bond was given on the same day. It is true, that the laws of Tennessee require a notice to be given to the appellee, yet it does not become us to scrutinize as technically the proceedings of the highest tribunal in a sister state, as if we were proceeding upon a motion to dismiss an appeal before us, on the ground of a want of citation. When a judicial tribunal has acted finally in a cause, the legal presumption is, that every thing has been done according to law, and it is evidence between the parties. 5 Mart., N. S., 464.

The defendant also objects to the reception of the record as evidence, because it is not certified by the presiding judge, or chairman of the Supreme Court. It is in evidence, that the Supreme Court of Tennessee consists of three judges, appointed for different districts, neither of whom has the title of presiding judge, or chairman; the record is certified by them all, and the Governor, and Secretary of State certify that they are all the judges. We think that the court did not err in receiving it in evidence. If all the judges of a court certify a record, it is fair to presume that the presiding judge has done so, particularly when it appears that the title is one of courtesy only. We think that the act of Congress in relation to certifying records from one state to another, has been substantially complied with.

It is objected, that the conveyance, or deed of trust, from Elizabeth Morgan to the plaintiff, was improperly received in evidence, it being a copy of a copy. This deed was not offered as a separate piece of evidence, but forms part of the record from Tennessee. It had been used as evidence in the cause when tried in the first instance, after due proof of its execution as we are bound to presume, and could not have been omitted without mutilating the record. It does not appear that the defendant objected to the deed when offered in the Court of Chancery, and it is too late to do it now. The plaintiff does not now rely so much on the conveyance,

as upon the judgment of the Supreme Court of Tennessee, which declares the trust to be legal, and orders its execution.

The various bills of exception being disposed of, we come to the merits of the case; and here, it is proper to remark, that the great error into which the counsel for the defendant has fallen, is the misconception of the character of the plaintiff's title, and of the object of this suit. His title is a legal one, in the strictest sense of the term, subject to certain equities in favor of the wife of the defendant, and, after her death, in favor of the slaves. The proceedings in the Supreme and Chancery Courts of Tennessee, are entirely conservatory, having for their object the preservation of the slaves, so that the equitable uses may be enjoyed by the wife of the defendant, and her intentions finally carried into effect. The suit is, therefore, not premature. The rights of the plaintiff are now vested.

The defendant contends that the execution of this deed of trust, was a fraud upon his marital rights. That question was very fully presented in his answer to the chancery proceedings in Tennessee, and was decided by the Supreme Court against him; we, therefore, shall not go into any examination of it.

It is further contended, that this suit is not the same with the one in Tennessee, and that the latter has not the effect of *res judicata* between the parties. It is not contended, that the two cases are the same in all respects. One, and the main purpose of this suit, is to prevent an evasion of the decree of the Supreme Court of Tennessee: and, as a reason why this should not be prevented, the defendant says that that decree is erroneous, and that we ought to revise it. Whether the judgment was in accordance with the allegations and prayers contained in the bill in chancery, is not for us to enquire. We look to the judgment, which forbids the defendant from removing the negroes out of the state, whereby the execution of the trusts may be entirely defeated, or so much embarrassed, as to injure materially those interested. There cannot be a question as to the power of judicial tribunals to adopt such conservatory measures, as may be necessary to prevent a party, in whose possession property may be, from removing it out of their jurisdiction, and thereby defeating the real owner in the prosecution of his rights. We have the authority of the highest legal tribunal in

Tennessee, for saying, that the laws of that state did not, under the circumstances, vest the title to the slaves in the defendant; and we know that his marriage would not have given him any title, had it taken place in this state. The use of the slaves is vested in the defendant's wife, during her life, and he is, under the laws of Tennessee, entitled to the benefit of that use; but that does not authorize a removal of the slaves beyond the limits of the state, in defiance of the commands of her courts, and without the consent of all parties interested.

Judgment affirmed.

In the cases of *Thomas Powell* v. *William Nixon and others*, *John D. Bein and another* v. *Rufus Edwards*, *J. Tobin* v. *Peter Cleary*, and *Michael Maher* v. *Patrick Summers*, from the Commercial Court of New Orleans; of *James M'Kinney*, *Curator*, v. *H. B. Kenner*, from the District Court of the First District; and of *Oscar Labatut* v. *José Prats and another*, and *Antoine P. Fondary* v. *Charles Ytasse*, from the Parish Court of New Orleans, the judgments of the courts below, were affirmed on appeal, in New Orleans, during the period embraced by this volume, with damages in each case as for a frivolous appeal.

SUPPLEMENT.

The opinion of the court in the following case, was pronounced in June, 1841. An application appears to have been made for a re-hearing, which was refused. This circumstance may have prevented its publication in the last volume of the Reports, which was issued from the press on the 22d of March.

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PAUL ELOI *v.* EDMUND MADER.

One born in marriage will not be allowed to repudiate his own legitimacy. The right to repudiate or contest his legitimacy belongs to the father alone, and can only be exercised by him, or his heirs, within a fixed time, and in certain cases. If this right is expressly or tacitly renounced by the father, it is extinguished, and can never be exercised by any one.

The legitimacy of a child born in wedlock, cannot be affected by the declarations of the mother. She has no right to disown a child, for maternity is never uncertain; she can only contest its identity.

The right to disavow a child (*action en désaveu*) is entirely distinct and different from that, which all parties, whose interest may be affected, have to contest the legitimacy (*contestation de légitimité*,) of one in whose favor the legal presumption does not exist.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Peyton*, and *I. W. Smith*, for the plaintiff, argued: 1. That the legitimacy of the plaintiff resulted from the marriage of his mother. Civ. Code, art. 203. Code Napoleon, art. 312. 2. No one but the husband of the mother can contest his legitimacy; the plaintiff cannot repudiate his own legitimacy. Civ. Code, arts. 210, 211. Code Napoleon, art. 316. 2 Toullier, Nos. 832—838. 3 Duranton, Nos. 64—79. 1 Œuvres de Cochin, p. 208. 2 Ib., 191, 192. *Tate* v. *Penne*, 7 Mart., N. S., 549. 3. The amendment was properly allowed. *Del Rio* v. *Gordon*, 14 La., 418. 1 Smith, 293. *Kingscote* v. *Bainsley*, Dick, 485. 4. The

heirs cannot be allowed to allege the infamy of their mother. 1 Proudhon, pp. 208, 220, p. 38, *et seq.* 3 Duranton, 350. Civ. Code, art. 233. Code Napoleon, art. 371.

Roselius, for the appellants. The legal heirs have a right to contest the claim, and, consequently, the legitimacy of the plaintiff. The amendment was improperly allowed. Civ. Code, art. 2270. Code of Pract., arts. 419, 420. 4 Mart., N. S., 518. 2 La., 508. *Shipman, &c.*, v. *Haynes et al.*, 15 La.

Morphy, J. The petitioner claims as the heir of Marie Fonteneau, his mother, one third of certain moneys and notes which were received by the defendant, his brother in law, from Jean Baptiste Eloi, who is alleged to be his father. Annexed to the petition is a certificate of baptism, in which the plaintiff is declared to be the legitimate son of J. B. Eloi and Marie Fonteneau, and a receipt of the defendant, stating that the money and notes delivered to him by J. B. Eloi, are the aggregate amount of the shares of his three minor children, Paul, Augustin, and Evelina Eloi, in the estate of their mother, Marie Fonteneau, and promising to pay an interest of ten per cent per annum thereon. The answer admits the defendant's signature to the acknowledgment or receipt annexed to the petition, but avers that it was signed through error; that at the time that the acknowledgement was made, it was believed that the plaintiff was one of the legal heirs of the late Marie Fonteneau; that the defendant has since discovered that the plaintiff is not one of the said heirs, but, on the contrary, is an adulterous bastard; that at the time of the birth of the plaintiff, his father, Jean Baptiste Eloi, was not married to his mother, Marie Fonteneau; that the plaintiff is the issue of an illicit and adulterous intercourse between Jean Baptiste Eloi and Marie Fonteneau; that at the time of the conception and birth of the plaintiff, his mother was the legitimate wife of the late Joseph Smith, who did not die until the 23d of January, 1821; that after the death of Smith, her first husband, Marie Fonteneau married J. B. Eloi, the father of the plaintiff, which marriage could not legitimate the plaintiff; that shortly after their marriage, the father and mother of the plaintiff caused him to be baptized as their legitimate son, although they were well aware that such was not the fact; that this circumstance led the defendant and the legiti-

mate heirs of Marie Fonteneau into error, and induced them to believe that the plaintiff was entitled to a share in said Marie Fonteneau's estate; that they discovered their error only about two months since, and that the legal heirs of the said Marie Fonteneau have since notified the defendant not to pay the proportion of the money and notes claimed by the plaintiff. The heirs of Marie Fonteneau intervened, made the same allegations as the defendant, and prayed that the funds in the hands of the defendant might be declared to be their exclusive property. There was a judgment below for the plaintiff; and the defendant and intervenors have appealed.

There is an admission on record that the mother of the plaintiff, Marie Fonteneau, was legally married to Joseph Smith about forty two years before that period; that said marriage was dissolved by the death of Smith, on the 23d of January, 1821; that the plaintiff was born on the 9th of February, 1820; and that his mother was married to Jean Baptiste Eloi, on the 5th of July, 1821.

After the trial below had commenced, the plaintiff's counsel moved the court to be allowed to strike out the averment in his petition that Jean Baptiste Eloi was the father of the petitioner, which averment he declared, under oath, had been made by him through error and an imperfect knowledge of the circumstances of the case, and that he had forgotten, until the petition was read that morning, that it contained such a statement. This motion was opposed, but the judge allowed the amendment to be made; whereupon, the defendant and intervenors took a bill of exceptions. Their counsel urges, that this amendment was illegally permitted, on two grounds, to wit: 1st, because it changed the substance of the action and issue joined; 2d, because a fact admitted in the plaintiff's petition, cannot be retracted or withdrawn, unless it is proved to have been made through an error of fact. If the mere question of practice, presented by this bill of exceptions, was to be considered, there would be much reason to doubt the correctness of the decision complained of, although, perhaps, even then the amendment might have been properly allowed, under the peculiar circumstances of this case. The subject matter of the averment was one of which neither the plaintiff, nor his counsel, could have any personal or positive knowledge, but from the view which we

have taken of the matter, it is immaterial whether the amendment be allowed or not. From the admissions in the record, it is clear, that the plaintiff was born in wedlock, and is the legitimate son of, the late Joseph Smith, the first husband of his mother. From the moment of his birth, his condition was fixed; it was acquired to him under that great conservative and moral rule which has descended from the roman jurisprudence into ours, *pater is est quem nuptiæ demonstrant.* The declaration of his mother, in the certificate of his baptism, made long after the death of his father, that he was the son of J. B. Eloi, no doubt caused the error in which the plaintiff appears to have grown up, but it could not take away from him, nor affect in any way his condition or ligitimacy; there is no principle in the civil law better settled than this. Civil Code art. 203. 7 Mart. N. S. 548, *Tate* v. *Penne.* 2 Toullier, Nos. 858, 859. 11 D'Aguesseau, pp. 510, 516. Dig. L. 29, de probationibus et demonstrationibus. The declarations of the plaintiff himself cannot affect his condition, and are not to be listened to. It would be *contra bonos mores* to allow him to repudiate his own legitimacy. Having been born in marriage, he cannot be permitted, by any admission, to bastardize himself. Arrets de Sirey, 1820, 2, 261. The averment, therefore, in the plaintiff's petition, whether made through error, or not, cannot change or affect his condition, and must be disregarded. It can in no way assist the intervenors, in their unholy and flagitious efforts to prove that their mother had an adulterous intercourse with Jean Baptiste Eloi, during the lifetime of her first husband.

Our attention has been drawn to another opinion of the judge, rejecting documentary and oral evidence, offered by the intervenors, to prove that the plaintiff is not the legitimate son of Marie Fonteneau, their mother, and that they alone are her lawful heirs. We think that the judge decided correctly. The plaintiff having been born during the first marriage, Joseph Smith, his lawful father, could alone, under particular circumstances, dispute his legitimacy. Not having done so, although he survived the birth of the plaintiff much longer than the time prescribed by article 210 of the Civil Code, it is not competent either for the defendant, or the intervenors, to raise the contest now. The right to disavow and repudiate a child born under the protection of the legal presumption, *pater is*

est, is peculiar to the father, and can be exercised only by him, or his heirs, within a given time, and in certain cases. If the father renounces the right expressly, or tacitly, it is extinguished, and can never more be exercised by any one. The mother has no right to disavow a child, because maternity is never uncertain; she can only contest the identity of the child. This she has not done in the present case, having, on the contrary, acknowledged the plaintiff as her son. As to her heirs, the intervenors, they cannot have greater rights than she had herself. The right to disavow (*action en désaveu*), is entirely distinct and different from that, which all parties, whose interest may be affected, have to contest the legitimacy of one in whose favor the legal presumption does not exist (*contestation de légitimité*). 2 Toullier, Nos. 831—838. Boileux's Commentaries on articles 315, 316, and 317, pp. 233, 234, and 235. Rogron, Code Civil Expliqué, pp. 161 and 168.

Judgment affirmed.

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ERRATA.

Page 30, line 26, for art. 185 read 186.
" 91, " 19, for Grubbs read Grubb.
" 393, " 9, for 2259 read 2295.
" 447, " 12, for Wamack read Womack.
" 514, " 13, for 1591 read 1291.
In several cases, for J. W. Smith read I. W. Smith.